No.

Supreme Court, U. FILED.

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MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

20

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, AND PORTS OF ANACORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# In the Supreme Court of the United States

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No.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States of America and the Federal Maritime Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

### OPINIONS BELOW

The opinions of the court of appeals (App. A, infra, pp. 1a-42a) and of the Federal Maritime Commission (App. C, infra, pp. 45a-79a) are not yet reported.

(1)

appears at 543 F. 2d 395. The opinion

#### JURISDICTION

The judgment of the court of appeals (App. B, infra, pp. 43a-44a) was entered on August 27, 1976. The Chief Justice on November 19, 1976, granted an extension of time to and including January 5, 1977, within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether national labor policy requires exemption of collective bargaining agreements as a class from the filing and approval requirements of Section 15 of the Shipping Act, 1916, 46 U.S.C. 814.

2. Whether, assuming national labor policy does not require such a blanket exemption, the collective bargaining agreement at issue in this case, which imposes conditions on employers who are not parties to the agreement, is nevertheless exempt from the filing and approval requirements of Section 15 of the Shipping Act, 1916.

# STATUTORY PROVISIONS INVOLVED

Sections 15, 16 and 17, of the Shipping Act, 1916, 39 Stat. 733-734, as amended, 46 U.S.C. 814-816, are set out in Appendix D, *infra*, pp. 80a-86a.

# STATEMENT

The agreement involved here grew out of negotiations between the Pacific Maritime Association

(PMA) and the International Longshoremen's and Warehousemen's Union (ILWU) concerning use by non-members of PMA of dockworkers dispatched through the ILWU-PMA hiring halls. PMA, a multi-employer bargaining organization, is composed of steamship companies, terminal operators, stevedores and related companies doing business on the West Coast (J.A. 169, 361). The ILWU represents dockworkers hired not only by PMA, but also by non-member employers.

Longshoremen on the West Coast are referred for employment through hiring halls jointly sponsored and supervised by PMA and the ILWU (J.A. 171-172). Prior to 1972, employers who were not members of PMA could secure employees through these hiring halls, and could participate in the PMA fringe benefit plans, by negotiating separate labor contracts with the ILWU, and supplemental participation agreements with PMA and ILWU (J.A. 172). The nonmembers paid specified fees to defray administrative expenses, and contributed to the fringe benefit funds in which they participated, but they were not required to use all the administrative services of PMA (which include central records and pay offices), and were free to determine by contract with the ILWU whether they should participate in all of the fringe benefit programs (J.A. 213-214). The ILWU also allowed some nonmembers to retain substantially

<sup>&</sup>quot;J.A." refers to the Joint Appendix in the court of appeals, which has been lodged with the Court.

steady workforces, although it used the union's control of the daily dispatching process to rotate nearly all the men working for PMA (J.A. 180). The practice of negotiating separate labor agreements enabled the ILWU to whipsaw by striking PMA while continuing to work for nonmembers (App. A, infra, p. 4a).

PMA asserted that the partial participation of non-members in administrative and fringe benefit programs is an administrative burden (J.A. 172-173). It also considered it unfair that nonmembers should receive the benefits of PMA bargaining over the registered workforce and fringe benefits without suffering the consequences of labor disputes between PMA and ILWU, and that nonmembers could even take over PMA members' work while the ILWU struck PMA (J.A. 173). In addition, it perceived the steady workforce of some nonmembers as giving them greater efficiency, and a preference in allocations at times of labor shortage (J.A. 180).

For these reasons, PMA, at the beginning of contract negotiations in December 1970, proposed that the basic Pacific Coast Longshore and Clerks Agreement "be amended to eliminate nonmember participation under any provisions of the Agreement unless they are not permitted by law to become members of the Association" (J.A. 170). The ILWU had proposed that "PMA will accept all fringe benefit contributions from any employer" (ibid.). After a strike on other issues was settled, a "ILWU-PMA Nonmember Participation Agreement," dealing with nonmember Participation Agreement," dealing with nonmem-

ber use of the joint workforce, was signed on April 25, 1972 (J.A. 186-187, 362-363); this was subsequently amended by a version adopted June 24, 1973 ("Revised Agreement") (J.A. 363, text at J.A. 452-454), which is at issue in this case.

The proceedings in this case began in 1972 when a group of public port authorities, nonmembers of PMA, filed a complaint with the Federal Maritime Commission alleging that the ILWU-PMA Nonmember Participation Agreement was subject to the approval of the Commission under Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, before implementation and that implementation of the agreement violated Sections 15, 16 and 17 of that Act, 46 U.S.C. 814, 815 and 816.

Section 15 (App. D, infra, pp. 80a-83a) applies to every common carrier by water, and any other

<sup>&</sup>lt;sup>a</sup> PMA and ILWU were the initial respondents. The Council of North Atlantic Shipping Associations ("CONASA"), an East Coast employers' organization, intervened on PMA's side before the Commission. CONASA also intervened before the court of appeals.

<sup>&</sup>lt;sup>3</sup> Common carrier by water is defined by Section 1 of the Act, 39 Stat. 728, as amended, 46 U.S.C. 801, to include a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas. A common carrier by water in foreign commerce means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its districts, territories or possessions and a foreign country, whether in the import or export trade (other than an ocean tramp). Common carrier by water in interstate commerce means a

person carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water. It requires them to file immediately with the Commission a copy of every agreement, or modification thereof, with another such carrier or such person, "to which it may be a party or conform in whole or in part," if the agreement controls, regulates, prevents or destroys competition or meets certain other specifications. Section 15 requires the Commission, by order after notice and hearing, to disapprove, cancel or modify any agreement or modification that it finds (1) to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors; (2) to operate to the detriment of the commerce of the United States; (3) to be contrary to the public interest; or (4) to be in violation of the Shipping Act, 1916, including Sections 16 and 17.

Before Commission approval or after disapproval, it is unlawful to carry out any agreement required to be filed. Agreements lawful under Section 15 are excepted from the antitrust laws. 15 U.S.C. 1-11 and 15.

The Commission, by order of October 19, 1972, severed the issue of its jurisdiction under Section 15. In an opinion and order dated January 30, 1975, it concluded that it had jurisdiction under Section 15 over the Revised Agreement, and that the agreement must be filed in accordance with the requirements of that Section (App. C, infra, p. 56a).

The Commission found that the agreement controlled or affected competition among persons subject to the Shipping Act. These persons included ocean common carriers and terminal operators who, as members of PMA, were parties to the agreement. The effects on competition included higher costs to nonmembers than to members, resulting because the agreement ignored differences in methods of operation and locality (App. C, infra, p. 68a). The Commission also noted that failure of nonmembers to

common carrier engaged in the transportation by water of passengers or property on the high seas (or Great Lakes) on regular routes from port to port between one state, territory, district or possession of the United States and another, or between places in the same territory, district or possession.

<sup>\*</sup> The initial and Revised Agreement, the Commission found (App. C, infra, pp. 47a-48a, n. 2), required that (1) nonmembers join the PMA for an indefinite period as a condition to the direct employment of any member of the joint PMA-ILWU workforce; (2) any separate contract between a nonmember and the ILWU conform to the provisions of the Revised Agreement; (3) nonmembers employ members of the joint workforce only through PMA allocation procedures and the ILWU-PMA dispatching halls; (4) nonmembers pay dues and assessments and accept proportional liability as to obligations of the PMA; and (5) nonmembers adhere to PMA decisions as to work stoppages, strikes and lockouts. The Revised Agreement states in paragraph 3 that "the essence of [the provisions relating to work stoppages] is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against nonmember participants" (J.A. 452).

sign the agreement would deprive them of ILW.U personnel, for whom there were no replacements in skilled jobs, and that hiring of nonunion personnel as a necessary result of the nonmember's refusal to sign the agreement would precipitate confrontations with union personnel, which would interfere with the nonmember's conduct of business (App. C, infra, pp. 70a-71a).

Following its earlier decision in United Stevedoring Corp. v. Boston Shipping Association, 16 F.M.C. 7, the Commission concluded that the agreement comes within the filing and approval requirements of Section 15 unless it is entitled to a "labor exemption" analogous to the labor exemption from the antitrust laws (App. C, infra, p. 56a).

The Commission made no finding whether the agreement met two of the tests of the Boston Shipping case; that is, whether it was the result of good faith bargaining or whether the union had entered into a "conspiracy" with management (App. C, infra, pp. 59a, 69a). It found, however, that the agreement did not meet two other tests: (1) it did not relate to a mandatory bargaining subject since it was not directed at the labor relations of PMA and its own employees but rather at the relations of nonmembers and the ILWU, and (2) it imposed terms on persons outside the bargaining unit—that is, the nonmember employers-to which those persons must conform, or incur sanctions contained in the agreement (App. C, infra, pp. 59a-69a). The Commission stated that the agreement, by imposing terms on third parties,

bore a "striking resemblance" to the one found unlawful in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (App. C, *infra*, p. 66a). The Commission concluded that the agreement had a "minimal effect on the collective bargaining process," but "a potentially severe and adverse effect upon competition under the Shipping Act," so that, on balance, assertion of its jurisdiction under the Shipping Act was warranted (App. C, *infra*, p. 70a). The Commission ordered the case set for hearing on the merits (App. C, *infra*, pp. 76a-77a).

On petition for review of that order, the court of appeals reversed. After lengthy preliminaries, the court stated that "[w]e must \* \* draw the line between shipping, labor and antitrust concerns in such a way that each statutory scheme remains effective" (App. A, infra, p. 27a). Because of the prior approval requirement of Section 15, which has no counterpart in the antitrust laws, the Commission's rul-

<sup>\*</sup>Commissioner Morse dissented, arguing that, in light of the labor policies involved, the Commission had discretion whether to exercise its jurisdiction, and should defer to the National Labor Relations Board and the courts. He also expressed reservations concerning Commission jurisdiction over "mixed membership" organizations, such as PMA might be, which include persons not by themselves subject to the Shipping Act (App. C, infra, pp. 73a-75a).

<sup>\*</sup>The opinion summarizes the history of this litigation. It then traces the evolving relationship between the antitrust laws and the Shipping Act (App. A, infra, pp. 10a-15a), labor policy and antitrust policy (App. A, infra, pp. 15a-23a), and national labor policy and the Shipping Act (App. A, infra, pp. 23a-26a).

ing "would make nearly impossible the maintenance or prompt restoration of industrial peace" in maritime labor relations (App. A, infra, p. 28a). The court concluded that this problem was not sufficiently alleviated by the interim approval procedures developed by the Commission for use in labor-related cases (App. A, infra, pp. 29a-30a). The court also noted that the legislative history of the Shipping Act makes no mention of labor agreements among the "problem agreements" to be regulated by the Commission (App. A, infra, p. 34a).

The court distinguished Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261 ("Volkswagen"), which held that the Commission had jurisdiction over a contract among employers that was related to a labor agreement. In this case, however, the contested agreement was part of the collective bargaining contract, not merely a "labor-related" agreement among employers. In the court's view, this difference was important (App. A, infra, pp. 33a-34a), although it agreed the distinction might seem arbitrary (App. A, infra, p. 35a), and although the Second Circuit had expressly rejected such a distinction in New York Shipping Ass'n v. Federal Maritime Commission, 495 F. 2d 1215, 1220, certiorari denied, 419 U.S. 964 ("New York Shipping") (App. A, infra, p. 36a, n. 33). The court concluded:

[W]e see no valid purpose in extending that rule [of Volkswagen] to encourage immediate disruption of negotiations. Exempting collective

bargaining agreements as a class from section 15 is the best method to reconcile these conflicting labor and shipping objectives [App. A, infra, p. 35a].

The court added that even if a balancing test were to be applied to the agreement at issue, the agreement would be exempt from filing under Section 15 (App. A, infra, p. 35a). It characterized the nonmembers' argument as basically an assertion that "they are being forced against their wills into a multi-employer unit" and concluded that Section 15 was not intended to cover problems "so clearly within the realm of National Labor Relations Board expertise" (App. A, infra, p. 37a). In the court's view, the proper forum for balancing of labor and antitrust considerations is the courts (App. A, infra, p. 38a)."

<sup>&#</sup>x27;Although the court recognized a broad labor exemption from Section 15, it did not extend such an exemption to Sections 16 and 17 of the Shipping Act. The court thought that these sections should be subject to a labor exemption similar to that under the antitrust laws (App. A, infra, p. 40a). It noted, in addition, that labor agreements exempt from the filing requirement of Section 15 would not qualify for the Shipping Act immunity from the antitrust laws that is accorded agreements approved under Section 15. They would remain subject to the antitrust laws, although the court suggested that some "nonstatutory [labor] exemption" from the antitrust laws might be created for those agreements (App. A, infra, p. 41a).

### REASONS. FOR GRANTING THE WRIT

1. The decision of the court of appeals that all collective bargaining agreements are exempt from Section 15 of the Shipping Act, 1916, is in direct conflict with the decision of the Second Circuit in New York Shipping, supra. The conflict places the Federal Maritime Commission in an untenable position in determining the extent of its jurisdiction.

The opinion in the present case takes on particular importance since Commission orders are reviewable in the United States Court of Appeals for the District of Columbia Circuit or the circuit in which the petitioner resides or has its principal office. 28 U.S.C. 2343. It can be expected that future challenges to the Commission's exercise of jurisdiction over collective bargaining agreements will, because of the opinion in this case, be pursued in the District of Columbia Circuit.

The decision here is important not only because it gives rise to a conflict in the courts of appeals, but also because the issue on which the courts disagree is a significant one. Although this Court in Volkswagen did not address the extent of the exemption from Section 15 for collective bargaining agree-

ments (see 390 U.S. at 278), Mr. Justice Harlan, concurring (id. at 282-291), and Mr. Justice Douglas, dissenting in part (id. at 295-316), discussed it at some length. Indeed, Mr. Justice Harlan pointed out the importance of defining the Commission's jurisdiction in this area. Id. at 286.

In New York Shipping, supra, which concerned an assessment agreement similar to that at issue in Volkswagen, the Second Circuit held that the Commission was not ousted of jurisdiction over the agreement simply because it was part of a collective bargaining agreement. Petitioner had argued that its cargo assessment agreement was exempt because, unlike Volkswagen, the union involved "took an active part in negotiating and is a party to the agreement here at issue." 495 F. 2d at 1220. Speaking for the court, Judge Friendly rejected this argument as a "distinction without a difference":

the fact that the union has here succeeded in forcing NYSA to bargain over the assessment formula does not by itself take the formula out of the reach of § 15. The union's achievement demonstrates its power to force this concession, but it does not dilute the magnitude of problems raised by the formula for shippers and carriers. [Id. at 1220-1221.]

The court held that the agreement raised "'shipping' problems logically distinct from the industry's labor problems" (quoting Volkswagen, supra, 390 U.S. at 286-287 (Harlan, J., concurring)), and it agreed with the Commission that because the Shipping Act

This holding is the law of the circuit for purposes of future cases brought in the District of Columbia Circuit, although in this case the court alluded to a possible alternative basis for its result. Of course, when a decision rests on two or more grounds, none can be relegated to the category of obiter dictum. Woods v. Interstate Realty Co., 337 U.S. 535, 537, citing United States v. Title Insurance & Trust Co., 265 U.S. 472, 486; Massachusetts v. United States, 333 U.S. 611, 623.

problems clearly predominated over the labor interests, the agreement was not exempt from Commission jurisdiction under Section 15. *Id.* at 1221-1222.°

By contrast, the court of appeals in this case held that agreements between labor and management are, as a class, exempt from Section 15 of the Shipping Act (App. A, infra, p. 35a). It makes no difference how strong the Shipping Act interests and how weak the labor interests: so long as the union is a signatory to the agreement, it is beyond the scope of Section 15. Expressly disagreeing with the Second Circuit, the court stated: "[W]e cannot accept the conclusion that active negotiation of the agreement by the union is 'a distinction without a difference.' 495 F. 2d at 1220" (App. A, infra, p. 36a, n. 33).

Although the court discusses the overlapping concerns of the antitrust laws, the Shipping Act and labor policy involved here, its decision to create a per se exemption for collective bargaining agreements precludes giving any weight to the provisions of Section 15 even when labor interests are clearly subsidiary to or are logically distinct from Shipping Act issues.

An important purpose of the Shipping Act is to provide a special forum for resolving issues concerning the anticompetitive effects of agreements affecting shipping. It allows more lenient treatment than the antitrust laws when this is necessary to protect the public interest, and it provides additional grounds to be considered in approving and disapproving agreements. See Volkswagen, supra, 390 U.S. at 274, n. 21. The Shipping Act should therefore not be lightly overriden in favor of competing concerns.

The refusal of the court below to give any weight to Shipping Act considerations is based upon a misapprehension concerning the effects of Section 15 on the collective bargaining process. The court concluded that the prior approval requirements of Section 15 are so harmful to collective bargaining in the maritime industry that giving any weight to Shipping Act considerations would be counter to national labor policy. But the Commission's approach in this area will affect few labor agreements. Pursuant to the tests developed by the Commission of and applied by it in this case, the Commission recognizes a labor

o The United States Court of Appeals for the First Circuit, in an unreported opinion, Boston Shipping v. United States (No. 72-1004, May 31, 1972), avoided deciding the issue of the coverage of collective bargaining agreements by Section 15, because the Federal Maritime Commission had asked to have that case remanded for further consideration of whether a collective bargaining agreement as to allocation of labor gangs among stevedores was subject to Section 15. The First Circuit noted, however, that it finds a distinction "very clear in [Volkswagen] \* \* \* between attaching a separate, section 15, agreement, in which the union has little interest, to a collective bargaining agreement, and making a multi-employer agreement with a union, eyeball to eyeball, but which, by the very fact that it is multi-employer, has some effect on employer competition" (id. at 80a-81a). This statement suggests that the First Circuit also would not adopt the per se rule of the District of Columbia Circuit.

<sup>&</sup>lt;sup>10</sup> These factors are set forth in United Stevedoring Corp. V. Boston Shipping Association, supra.

exemption from Section 15 for most collective bargaining agreements, analogous to the labor exemption from the antitrust laws.

Even if part of a labor agreement, as in this case, is brought into question, any severable parts that are not covered by Section 15 can be implemented without waiting for approval; in addition, temporary approval and expedited handling can be sought from the Commission.<sup>11</sup>

Moreover, it is by no means clear that delay in putting a labor agreement into effect is harmful to collective bargaining when that delay is to obtain approval which assures against subsequent invalidation of that agreement. Nor is it clear that the uncertainty resulting from prior approval is substantially greater than uncertainty associated with the possibility of later invalidation of the agreement under the antitrust laws and Sections 16 and 17 of the Shipping Act. As Mr. Justice Harlan observed in Volkswagen, "I would find it very difficult to see why provision for advance approval and exemption of labor related agreements would not be preferable, from the standpoint of facilitating collective bargaining, to the 'wait and see' approach." 390 U.S. at 285-286.

Even if the effects of Section 15 on the collective bargaining process were as substantial as the court believes, this is nonetheless not an adequate basis for a per se rule that is applied regardless of the strength of the labor interests, or the adverse effects of the agreement on competition in the maritime industry.<sup>13</sup> This result is contrary to the fundamental canon of statutory construction that if there are two acts upon the same subject, the rule is to give effect to both if possible.<sup>14</sup> In the present case a balancing test does in fact make it possible to give effect to both labor and Shipping Act considerations, and is workable in practical applications, as the Second Circuit has shown in New York Shipping, supra.

2. The court of appeals stated that even if it were to adopt a balancing test to determine if the Commission had jurisdiction in this case, the agreement would be exempt from filing (App. A, infra,

<sup>&</sup>lt;sup>11</sup> It is the Commission's general policy promptly to grant interim approval to collective bargaining agreements in appropriate cases, when asked to do so by the signatories. No request for interim approval or expedited handling was made in this case by either PMA or ILWU.

laws, which the court relies upon to replace Section 15, are by no means a complete substitute. Section 15, for example, permits disallowance of agreements under a broad "public interest" standard, or on the general ground that they operate "to the detriment of the commerce of the United States." Section 16 by contrast contains a more specific prohibition on giving "undue or unreasonable preference or advantage." Section 17 is also more specific: it makes unlawful rates, fares, or charges which are "unjustly discriminatory between shippers or ports" or "unjustly prejudicial to exporters of the United States as compared with their foreign competitors."

<sup>&</sup>lt;sup>13</sup> United States v. Borden, 308 U.S. 188, 198, citing United States v. Tynen, 11 Wall. 88, 92, and Henderson's Tobacco, 11 Wall. 652, 657.

p. 35a). The court's ruling in this regard, which we believe to be in error, also raises important issues relating to the extent of the Commission's jurisdiction, as well as issues concerning the application of the Shipping Act, 1916, when both labor interests and practices affecting competition are present.

The Commission in this case determined that the Shipping Act concerns outweighed labor concerns. The Commission found this case analogous to United Mine Workers v. Pennington, supra," because, like Pennington, it involved a collective bargaining agreement in which a union and one set of employers agreed to impose terms upon another set of employers outside the bargaining unit." In producing an immediate impact outside the PMA bargaining unit, the agreement would disadvantage ports in competition with PMA.

According to the court, however, "the nonmembers' argument boils down to an accusation that they are being forced against their wills into a multi-employer unit"; this possible violation of the labor laws, the court believed, is a matter within the expertise of the National Labor Relations Board and, because the Labor Board has no primary jurisdiction over anticompetitive agreements, federal courts should be left to resolve the balancing of antitrust policies and collective bargaining objectives (App. A, infra,

pp. 37a-38a).

Although purporting to balance interests (App. A, infra, p. 35a), the court in effect has held that because the dispute can be characterized in labor terms, the Commission is ousted of jurisdiction. This confuses the existence of a labor interest with the strength of that interest, and reverts to a standard very similar to a per se rule. The fact that, in the course of seeking to impose terms on employers outside the bargaining unit, PMA and the union may have violated the labor laws as well as the antitrust laws is, we submit, no reason to deprive the Commission of jurisdiction."

On the basis of Pennington and related cases," a proper balancing of labor and shipping interests in this case leads to the conclusion that there was minimal legitimate labor interest in the Revised Agreement insofar as it imposed conditions on employers

<sup>14</sup> Since Section 15 of the Shipping Act is to a large degree a surrogate for the antitrust laws in the area of ocean shipping, the use of labor-antitrust criteria in drawing balances is proper. See Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 738-739.

<sup>25</sup> The Court said in Pennington that "[T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry." 381 U.S. at 666.

<sup>18</sup> The existence of collateral labor law issues would not deprive an antitrust court of Sherman Act jurisdiction in a comparable situation. See, e.g., Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616, 626.

<sup>17</sup> See, e.g., Local Union No. 189 V. Jewel Tea Co., Inc., 381 U.S. 676; Connell Construction Co. v. Plumbers & Steamfitters, supra.

that were not parties to it. Therefore no labor exemption should have been applied to that agreement.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1977.

#### APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1140

PACIFIC MARITIME ASSOCIATION, PETITIONER

D.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS
COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATION
PORTS OF ANACORTES, ET AL., INTERVENORS

No. 75-1215

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petitions for Review of an Order of the Federal Maritime Commission

> Argued February 27, 1976 Decided August 27, 1976

Before: WRIGHT, McGowan and Tamm, Circuit Judges.

Opinion for the Court filed by Circuit Judge TAMM.

TAMM, Circuit Judge: This appeal constitutes the most recent controversy in a series of cases exploring the jurisdictional overlapping of shipping, labor and antitrust concerns in collective bargaining agreements within the shipping industry. At issue in the controversy is applicability of the pre-implementation filing and approval procedure of section 15 of the Shipping Act of 1916 to a collective bargaining agreement between the union and a multi-employer bargaining unit. The Federal Maritime Commission (FMC or Commission) held a portion of the agreement affecting employers who are not members of the Pacific Maritime Association (PMA) to be outside the labor/antitrust exemption and thus subject to filing with and approval or disapproval by the FMC. Recognizing that the reconciliation of the competing policies and statutory schemes is a difficult one, we nonetheless believe the prior-restraint procedures of section 15 impose such an extraordinary burden on collective bargaining that the dividing line must be drawn between labor-related agreements among employers, which are subject to section 15, and direct agreements negotiated between union and management, which we hold to be outside the scope of that section. For the reasons which follow, we remand to the Federal Maritime Commission.

## I. FACTUAL BACKGROUND

PMA is an employers' collective bargaining association representing numerous Pacific Coast employers of dockworkers. The International Longshoremen's and Warehousemen's Union (ILWU), which represents dockworkers hired not only by PMA but also by nonmember employers, bargains separately with the multi-employer unit and with individual nonmember ports. At issue in this appeal are 1972 and 1973 agreements negotiated by PMA and ILWU regarding nonmember use of dockworkers jointly registered and dispatched through ILWU-PMA hiring halls to both PMA and nonmember employers. Prior to this agreement, nonmember employers negotiated separate labor agreements with ILWU; they also obtained separate agreements with PMA which allowed them to use the hiring halls and the complex accounting and pay offices 2 maintained

The FMC made no findings of fact as to whether the agreement was a result of "eyeball to eyeball" good faith bargaining. Pacific Maritime Ass'n., Doc. No. 72-48 (FMC, Jan. 30, 1975), J.A. at 523. Although the FMC has denigrated the union's interest in obtaining uniform fringe benefits and access for all employees to joint hiring hall accounting procedures—conclusions which we find highly questionable—the affidavits of both petitioner ports, J.A. at 86-87, and PMA, J.A. at 183-88, 194-203, reveal a history of collective bargaining over nonmember participation and a concrete controversy between PMA and the ILWU in 1972 which was resolved by negotiation and compromise.

Because jointly registered employees work varying hours for separate employers, not all of whom have agreed to identical fringe benefits, the dispatch and accounting procedures

by PMA. Under these separate agreements, non-members paid fringe benefit fund contributions and a participation fee to the PMA for whichever of the fringe benefit programs settled upon in their ILWU contracts. In addition to the differences in fringe benefit plans between PMA and nonmember collective bargaining agreements, there were other substantial labor variances. For example, nonmembers often negotiated steady workgangs rather than the rotation of workers generally required for PMA employers. In addition, the practice of negotiating separate labor agreements had enabled the union in the past to whipsaw by striking PMA but continuing to work for nonmembers.

At the beginning of negotiations for the 1972 collective bargaining agreement, the union demanded PMA to accept all fringe benefit contributions from any employer. In contrast, PMA proposed elimination of all nonmember participation in the fringe benefit fund. J.A. at 170. When the parties failed to reach agreement on other direct economic issues, ILWU went on strike. Several months later the

union and PMA executed a memorandum of understanding resolving some terms in dispute and listing some 11 others to be resolved by further negotiation, mediation or arbitration; the list included resolution of the nonmember participation dispute. Within three months PMA and the union issued Supplemental Memorandum of Understanding No. 4, the agreement primarily at issue in this appeal. In the Supplemental Memorandum the parties agreed that PMA would accept contributions from all nonmembers who executed a uniform participation agreement. This standard agreement, included in the Supplemental Memorandum, would require nonmembers, as a condition of using the joint dispatching halls for jointly registered employees, to participate in all fringe benefit programs," pay the same dues and as-

require detailed record-keeping. See J.A. at 134. See also C. LARROWE, SHAPE-UP AND HIRING HALL chs. 5-6, at 139-83 (1955).

<sup>&</sup>lt;sup>3</sup> The participation fee represented administrative costs of the individual fringe benefit, not of the entire hiring hall. PMA Br. at 7; compare J.A. at 11-13.

<sup>&#</sup>x27;Fringe benefits include a vacation plan, pay guarantee plan, pension plan, welfare plan, and a holiday plan. ILWU Br. at 16 note.

<sup>&</sup>lt;sup>8</sup> PMA has strongly contested the FMC finding that the Revised Agreement of 1973 is substantially the same as Supplemental Memorandum of Understanding No. 4. J.A. at 347-50.

<sup>7.</sup> The nonmember participant shall participate in the ILWU-PMA Pension Plan, the ILWU-PMA Welfare Plan, the PMA Vacation Plans (longshoremen and clerks, and walking bosses/foremen) and the ILWU-MA Guarantee Plans (longshoremen and clerks/ and walking bosses/foremen) in accordance with the terms applicable to such participation. Such nonmember shall make payments into these Plans at the same rates and at the same times as members of PMA are to make the respective payments. Attached are statements of terms and conditions currently in effect with respect to such participation. Nonmember Participants shall be subject to the same audits as members of PMA.

sessments as PMA members," use steady men "in the same way a member may do so," and be treated as a member during work stoppages."

\* [Continued]

Revised Agreement ¶ 7, J.A. at 453. See also Supplemental Memorandum No. 4 ("S.M.4") ¶ 4, J.A. at 425.

9. Each nonmember participant shall pay to the PMA an amount equal to the dues and assessments on the same basis that a PMA member would pay. Payments shall be made at the same time the member would pay.

Revised Agreement ¶ 9, J.A. at 453. See also S.M.4 ¶ 6, J.A. at 426.

\* 5. A nonmember participant may obtain and employ a man in the joint work force on a steady basis in the same way a member may do so. When such participant employs a man to work on a steady basis, it shall notify PMA immediately. On request from PMA, each such participant shall furnish to PMA a list of men it is using on a steady basis. Steady men shall participate in the Pay Guarantee Plan in accordance with the rules that are adopted by PMA and ILWU.

Revised Agreement ¶ 5, J.A. at 453. See also S.M.4 ¶ 3a, J.A. at 425.

 3. A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA. For example

a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA,

b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, nonmember participants shall not obtain men from the dispatch hall.

c) if during a work stoppage by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch

Several municipal corporations which own and operate Pacific Coast facilities and which are not members of PMA filed a petition with the Commission seeking investigation of Supplemental Memorandum of Understanding, No. 4 " and rulings that the agreement was subject to filing and approval under section 15 of the Shipping Act and was violative of Sections 15, 16 and 17 as unjust, discriminatory and contrary to the public interest. After PMA filed the Nonmember Participation Agreement with the Commission, the FMC severed, for expeditious resolution, the issue of jurisdiction under section 15 (and a possible labor exemption) over the master collective bargaining agreement, Supplemental Memorandum No. 4, and underlying agreements among PMA members.

hall for PMA members, such limited dispatch shall be available to nonmember participants.

The essence of b) and c) of this section is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against nonmember participants.

Revised Agreement ¶ 3, J.A. at 452. See also S.M.4 ¶¶ 8-10, J.A. at 426-27.

The Revised Agreement also required uniform terms regarding selection of men in the joint work force, continuance of obligation to pay PMA assessments, and use of uniform payment and record forms.

The Commission's first order established an investigation as to any violations of sections 15, 16 and 17 by those agreements "between and among members of PMA" which were embodied in the collective bargaining agreement and the Supplemental Memorandum. 37 Fed. Reg. 18495 (1972); J.A. at 12.

Although the agreement appeared to be outside the labor/antitrust exemption, the Memorandum of Law of Hearing Counsel of the FMC found:

[T]he subject agreements involve antitrust and related labor policies and require a determination whether parties engaged in collective bargaining have exceeded the scope of legitimate bargaining. For these reasons, we submit, these matters ought to be left to the courts and the NLRB who are equipped to cope with them.

J.A. at 77-78. The Memorandum also suggested that should the courts find the agreements lawful under antitrust principles, actual practices implementing them might still violate sections 16 and 17. *Id.* The parties then responded with memoranda of law and affidavits in which they expressed counter allegations and denial of a conspiracy between PMA and ILWU "to eliminate outside competition either by withholding labor or by forcing outside employers into PMA membership." J.A. at 297. Hearing Counsel concluded again that the problem raised

issues primarily of a labor and antitrust nature and that if the Commission pursued the investigation it would become enmeshed in areas foreign to its expertise. Furthermore, such an investigation would serve to impede the parties seeking relief in the pending antitrust cases before the courts.

Id. at 301.11

During the pendency of the proceedings before the Commission, PMA and ILWU began negotiations on a new agreement. The new Memorandum of Understanding (June 24, 1973) included as Article IX a revised ILWU-PMA Nonmember Participation Agreement containing provisions similar to those challenged in the 1972 Supplemental Memorandum. The Commission then amended the scope of its proceedings to include this 1973 agreement. 39 Fed. Reg. 4506 (1974).

One year later, in January of 1975, the Commission served its Report and Order in this case. The FMC rejected the Memorandum of Hearing Counsel and found instead that the revised agreement, i.e. Article IX of the 1973 collective bargaining agreement, is an "agreement" subject to FMC filing and approval. Applying the standards articulated in United Stevedore Corp. v. Boston Shipping Association, 16 F.M.C. 7 (1972), the Commission found the agreement to be outside the protection of a labor exemption to the Shipping Act and ordered an in-

<sup>&</sup>lt;sup>11</sup> The pending antitrust cases to which Hearing Counsel refers were discussed at length in his first Memorandum, J.A. at 57-61. In the first case, *Port of Anacortes* v. *PMA and* 

ILWU, Civil No. 72-618 (D. Ore., filed Aug. 2, 1972), eight ports challenge Supplemental Memorandum No. 4 under the antitrust laws. The second case, brought by the Port of Longview, makes basically the same allegations of antitrust conspiracy violations. Port of Longview v. PMA and ILWU, Civil No. 72-626 (D. Ore., filed Aug. 3, 1972). The third case added to the general antitrust claims a challenge to the collective bargaining agreement provision concerning containerized shipments. Port of Seattle v. PMA, Civil No. 214-72C2 (W.D. Wash., filed Apr. 4, 1972). All three cases were stayed pending Commission determination of the status of the agreements under the Shipping Act.

vestigation to determine whether the agreement should be approved and whether the master collective bargaining agreement, would violate sections 16 and 17. PMA and ILWU then appealed to this court.

### II. LEGAL BACKGROUND

Before resolving the issues in this case we turn briefly to the three lines of cases which converge in the jurisdictional dispute before us. The first line of cases reflects the tension created by the special shipping considerations in maritime antitrust litigation. The second examines and attempts to reconcile the disparate aims of national labor policy and antitrust laws. The final series of cases deals with implications of Shipping Act regulation on collective bargaining.

# A. Antitrust/Shipping Act

By the beginning of the twentieth century Congress had recognized the need for special legislation to prevent monopolies and unlawful restraints. The Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890 attempted to limit corporate evils such as price-fixing and restrictive agreements. These legislative efforts to prevent abusive practices continued in 1914 with the adoption of the Clayton Act and Federal Trade Commission Act.

It was during this same period of increased interest in freedom of competition that Congress undertook an extensive study into the antitrust problems

rampant in the maritime industry. The Shipping Act of 1916, now administered by the Federal Maritime Commission, was aimed at abuses in both domestic and foreign shipping caused by secret anticompetitive agreements between shippers. Recognizing the beneficial aspects of many agreements, Congress accepted a compromise: in order to participate in cooperative working arrangements shippers would have to submit the arrangements for approval by the federal regulatory agency before implementation.

These agreements and conferences engaged in price fixing. discriminatory rates, limiting sailings by certain lines or from certain ports, freight volume restrictions, tariff pooling, and assessing fines for assistance to non-conference lines. In addition, they fought outside competition by giving tariff rebates or by using "fighting ships" subsidized by the conference to destroy a single competing line. H.R. Doc. No. 805, 63d Cong., 2d Sess. 281-95 (1914) ("Alexander Report").

prohibition of cooperative arrangements between practically all the lines in nearly all the divisions of our foreign trade—would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as reculting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination.

H.R. REP. No. 659, 64th Cong., 1st Sess. 28 (1916), quoting Alexander Report at 416.

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter . . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair . . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. . . .

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof . . . .

46 U.S.C. § 814 (1970). In this way Congress attempted to preserve general principles of competition without eviscerating efforts of the nation's shipping lines to compete internationally. Although the desired agreements increased the prospects for fair competition within the specialized conditions of the shipping industry, they necessarily violated basic principles of general antitrust laws. Congress therefore created an exemption for approved plans:

Every agreement, modification, or cancellation lawful under this section . . . shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

46 U.S.C. § 814 (1970).

Numerous Supreme Court cases interpreting section 15 have considered the interaction between the Shipping Act exemption and the antitrust laws. Recognizing the expertise of "an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade," the Court declared that the Shipping Board, predecessor of the FMC, had primary jurisdiction in a case seeking a Clayton Act injunction against un-

approved agreements with alleged antitrust consequences. United States Navigation Co., Inc. v. Cunard Steamship Co., Ltd., 284 U.S. 474, 485 (1932). See also Far East Conference v. United States, 342 U.S. 570 (1952). This concept of primary jurisdiction was defined more narrowly in Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966), where the Court stressed the limited nature of the antitrust exemption created by the Shipping Act and, distinguishing Cunard and Far East, held that a suit for treble damages for antitrust violations under an unapproved conference agreement would lie in district court. The Court stressed that since the Commission could approve these agreements only prospectively, awarding treble damages for completed conduct would not interfere with the Commission's future actions. 383 U.S. at 220-22.

In addition to these primary jurisdiction cases, suits involving the proper standards for approving section 15 agreements have led the Court to consider applicability of antitrust principles to Shipping Act concerns. In FMC v. Aktiebolage Svenska Amerika Linien, 390 U.S. 238 (1968), the Court recounted the historical development of the Act and determined that antitrust violations could serve as a basis for disapproving agreements under the "contrary to the public interest" language added to section 15 in 1961." "Congress has, it is true, decided to confer

antitrust immunity unless the agreement is found to violate certain statutory standards, but as already indicated, antitrust concepts are intimately involved in the standards Congress chose." 390 U.S. at 245. In addition the Court has refused to expand potential antitrust immunity for agreements not clearly covered under section 15's emphasis on on-going arrangements. FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 & n.8 (1973) (acquisition-of-assets agreements).

These cases reveal the Court's acknowledgment of the delicate balance which Congress struck between the national economic policy of fair competition and the specialized needs of the shipping industry. This balance has become even more precarious when the labor factor also must be fitted into the jurisdictional equation.

## B. Labor/Antitrust

While the paths of antitrust and the Shipping Act policies have sometimes diverged, those of labor and antitrust have consistently collided head-on. In the early years of this century, attempts to organize labor were frequently defeated in the legal forum by application of antitrust laws. See, e.g., Bedford Cut Stone Co. v. Stone Cutters' Association, 274 U.S. 37 (1927); Duplex Printing Press Co. v. Deering,

<sup>&</sup>quot;The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair . . . , or to operate

to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter . . . . " 46 U.S.C. § 814, as amended, Pub. L. No. 87-346 (Oct. 3, 1961) (emphasis added).

254 U.S. 443 (1921); Loewe v. Lawlor, 208 U.S. 274 (1908). This historical animosity resulted from two opposing objectives: antitrust laws sought to promote competition while unions strove to eliminate wage competition through collective bargaining." Congress recognized these objectives and attempted to foster the national objective of collective bargaining by providing a statutory labor exemption in

Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 806 (1945).

Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.

Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 622 (1975).

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint,

the Clayton Act " and by regulating the bargaining

or coercion of employers of labor, of their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1970). See also 29 U.S.C. § 52. (1970):

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, if any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or

The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining.

<sup>16</sup> See, e.g., 29 U.S.C. § 102 (1970):

process through various provisions of the National Labor Relations Act. In addition the courts have developed a nonstatutory labor exemption to the antitrust laws. See, Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 622 (1975).

Beginning with Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), the Court held that a violent primary sit-down strike did not violate the Sherman

from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; or shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

and 29 U.S.C. § 101 (1970):

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

<sup>18</sup> See, e.g., 29 U.S.C. § 158(b) (4) (regulating union secondary activities); § 158(e) (prohibiting hot cargo clauses).

Act. The broad language " of the case limiting the Sherman Act's scope as to price effects of labor negotiations was gradually disavowed, however, as the Court evolved an ad hoc definition for this non-statutory exemption.

Although union picketing and product boycott within a labor jurisdictional dispute were exempt activitives, of United States v. Hutcheson, 312 U.S. 219

Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-04 (1940) (citations omitted).

<sup>19</sup> Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or un-

graphical monopoly benefitting both labor and management was not protected. Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945). While the Court assumed that the bargaining agreements in which the union persuaded employers not to buy goods manufactured by employees not members of its local would not have violated the Sherman Act, the union had also joined in a manufacturer/contractor plan to bar all other business men from New York in order to charge exaggerated prices. This combination was not within the exemption to the antitrust laws.

In 1965 the Court further refined the non-statutory exemption standards. The United Mine Workers forfeited their exemption by agreeing with the large mine owners in a multi-employer unit to impose a certain wage scale on small owners, even though the terms imposed were mandatory bargaining topics. United Mine Workers of America v. Pennington, 381 U.S. 657 (1965). The union (which also had invested in certain mines) had compromised its demands against mechanization and control of working time in order to obtain industry-wide wage increases. The facts showed a pattern of union-owner cooperation to drive small owners out of the coal market. The major defect in the union's behavior was its agreement to impose "specified labor standards outside the bargaining unit . . . . For the salient characteristics of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy." Id. at 68.

In a companion case to Pennington, however, the Court upheld a strike-coerced agreement in which the butchers' union obtained the same marketing hours restriction from Jewel Tea Co. that it had negotiated with a multi-employer bargaining group. Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965). Three Justices-White, Warren and Brennanstressed the fact that the trial court found no evidence of a conspiracy and that, since butchers would be required for night operations, the union's interest in working hours created a legitimate concern in marketing hours as well. Id. at 692. Justices Goldberg, Harlan and Stewart, agreed with the result in Jewel Tea, but dissented from denial of the exemption in Pennington. For these jurists, national labor policy required an exemption for "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act . . . ." Id. at 710. Justice Douglas, with whom Justices Black and Clark joined, dissented in Jewel Tea on the grounds that the multi-employer collective bargaining agreement was itself evidence of a conspiracy between labor and management to impose marketing terms on other employers. Id. at 736.

Just last term the Supreme Court again attempted to define with more precision the landmarks by which bargaining parties and lower courts can find their

selfishness of the end of which the particular union activities are the means.

United States v. Hutcheson, 312 U.S. 219, 232 (1941).

way through the obscurities of the labor/antitrust labyrinth. The Court found that a plumbing and mechanical workers union could not obtain its legitimate goal of organizing as many subcontractors as possible by compelling a "stranger" and general contractor to agree to use only subcontractors hiring the union's members. Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975). This direct restraint on competition would eliminate competition based on efficiency and was not a natural consequence of elimination of competition over wages and conditions. Id. at 623, 625. While the general contractor had not argued that the union had con-

spired with organized subcontractors, the Court did observe that a "most favored nation" clause in the multi-employer bargaining agreement "enhanc[ed] the restraint of trade". Id. at 625 n.2. It thus appears that the Court has dispensed with the requirement of conspiracy for subjecting union activity to antitrust litigation," at least outside employer-employee bargaining. See also 61 Cornell L. Rev. 436, 448 n.63 (1976); 50 Tulane L. Rev. 418, 426 (1976).

## C. Labor/Shipping

We turn now to a series of cases in which the Federal Maritime Commission has attemted to apply the vagaries of labor/antitrust principles to agreements affecting labor relations within the shipping industry.

Prior to 1968, the FMC had resisted the concept that it had jurisdiction under section 15 over agreements affecting employer-employee relationships. The Supreme Court, however, in 1968 overruled the FMC and this court as to the applicability of the Shipping Act's pre-implementation procedures to an agreement among PMA members which formulated assessments for the establishment of a \$29,000,000 fund that had already been negotiated with the ILWU. Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261 (1968). Despite warning by Justice

The union had disclaimed any interest in representing Connell's employees. This factual aspect of the case is highly relevant since the Court determined that section 8(e) of the National Labor Relations Act allows a subcontracting agreement "within the context of a collective-bargaining relationship." 421 U.S. at 627. Even more important is the Court's suggestion that within a collective bargaining setting, labor policies may weigh more heavily.

There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement.

Id. at 625-26 (emphasis added).

Furthermore, the coercive secondary strike was not subject only to the special remedies of the National Labor Relations Act since the violation at issue related to section 8(e) regarding hot cargo clauses rather than 8(b) (4) limiting secondary activities. Id. at 633-35. Contra, id. at 639-55 (Stewart, J., dissenting). See also St. Antoine, Connell: Antitrust Law at the Expense of Labor Law, 62 VA. L. REV. 603, 627-28 (1976).

The Court held only that the agreement was subject to antitrust litigation, not that it actually violated the Sherman Act. 421 U.S. at 637.

Douglas that this employer agreement, although outside employer-employee negotiation processes, was intimately related to labor relations, id. at 296-313, the majority relied on the broad language of section 15 regarding any "cooperating working arrangement" to determine that the FMC had jurisdiction under section 15 to approve, disapprove or modify the agreement, and that the fee assessment also might violate sections 16 and 17. Of particular concern was the disproportionate cost of automobile shipping, a cost passed on to the manufacturer despite the minimal benefit received. Id. at 281-82.

The second step leading to the present controversy involved an attempt by the FMC to assert jurisdiction over a labor allocation agreement among members of the multi-employer unit and an employee assignment provision worked out later among employers and then embodied in the collective bargaining agreement. United Stevedoring Corp. v. Boston Shipping Association, 15 F.M.C. 33 (1971) (hereinafter Boston I). On appeal the First Circuit expressed its "astonishment" at the Commission's action and remanded, noting the difference "between attaching a separate, section 15, agreement, in which the union had little interest, to a collective bargaining agreement, and making a multi-employer agreement with a union, eyeball to eyeball, but which, by the very fact that it is multi-employer, has some effect on employer competition." Boston Shipping Association v. FMC, Civil No. 72-1004 (1st Cir. filed May 31, 1972). The Commission upon remand examined the exemption applied to section 15 agreements. United Stevedoring Corp. v. Boston Shipping Association, 16 F.M.C. 7 (1972) (hereinafter Boston II). Although "organic agreements of pure collective bargaining" would never require filing, a line would be drawn "where purely labor matters cease and shipping matters begin." Id. at 14. The Commission articulated a four-prong test, on element of which would be controlling, and found that both agreements before it were entitled to the exemption.

The following year the Commission again faced the interplay of labor agreements and shipping concerns. New York Shipping Association, 16 F.M.C. 381 (1973). At issue was an assessment formula for funding the fringe benefit program. Both the union and the multi-employer bargaining unit had nego-

<sup>1.</sup> The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "armslength" or "eyeball to eyeball".

<sup>2.</sup> The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

<sup>3.</sup> The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.

<sup>4.</sup> The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspirator with management.

United Stevedoring Corp. v. Boston Shipping Ass'n, 16 F.M.C. 7, 13 (1972).

worked out by the employers had proven unable to assure fund security. Although the FMC claimed jurisdiction over the assessment formula, it granted interim approval so as not to "jeopardize relations between the NYSA and the ILA." Id. at 396. This decision was affirmed by the Second Circuit as merely an extension of the Volkswagenwerk holding. New York Shipping Association v. FMC, 495 F.2d 1215 (2d Cir.), cert. denied, 419 U.S. 964 (1974).

These cases have continued to cut ever finer the distinction between "organic collective bargaining agreements" and shipping cooperative arrangements. In the case before us, the FMC was compelled once again to draw the difficult line which reconciles Shipping Act policies with labor policies. Boston II, supra, 16 F.M.C. at 10. Although we sympathize with the Commission's herculean task of following "the rather imprecise guidelines of Volkswagen," id. at 11, while avoiding intrusion into "the already strife-ridden maritime labor world," id. at 10, we do not believe that asserting jurisdiction under section 15 over the collective bargaining agreement before us is within the mandate of Volkswagenwerk or the structure of the Shipping Act.

# III. RESOLUTION OF THE ISSUE

As the three lines of cases summarized above illustrate, application of the Shipping Act to collective bargaining agreements affecting emloyers outside the bargaining unit requires reconciliation of

conflicting policies. We must, whenever possible, draw the line between shipping, labor and antitrust concerns in such a way that each statutory scheme remains effective.25 In this case we believe that the jurisdictional boundary drawn by the FMC impinges unnecessarily upon collective bargaining processes. The FMC, recognizing the need for this balancing, has attempted to distill the essence of the judiciallydeveloped antitrust exemption for labor and apply it to the Commission's jurisdictional bases in sections 15, 16 and 17. Were the procedures of section 15 the same as those of the antitrust laws we would agree that the transplanted exemption might well serve the aim of statutory reconciliation. The unique structure of the Shipping Act, however, makes this an unsatisfactory solution in several ways.

Unlike the antitrust laws, section 15 prescribes a procedure whereby agreements subject to the Act must be filed with the Commission before implementation. The legislative scheme is a sound one for assuring that agreements among carriers which fix rates, pool earnings, allocate ports, or limit traffic must be approved or modified by the agency with an expertise in shipping matters. As the legislatively

<sup>&</sup>quot;[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." Radzanover v. Touche Ross & Co., 44 U.S.L.W. 4762, 4764 (U.S. June 7, 1976, quoting Morton v. Mancari, 417 U.S. 535, 551 (1974).

<sup>\* 46</sup> U.S.C. § 814 (1970), which appears supra in the text at 10-11.

established regulator of maritime concerns, the Commission needs authority to postpone the effective date of such agreements pending full examination of their impact on the entire industry. The Federal Maritime Commission, however, is not in any way the congressional choice of regulator for labor relations within the shipping industry. In contrast, as pointed out by Justice Douglas in Volkswagenwerk, the Maritime Labor Board created in 1938 was allowed to expire, and Congress has consistently refused to provide a specialized federal maritime labor agency. 390 U.S. at 299-301 (Douglas, J., dissenting). Subjecting negotiated labor agreements to filing and approval (or disapproval or modification) would place collective bargaining units in the shipping industry under more stringent federal regulation than other transportation industries and thus at a competitive disadvantage.

One obvious disadvantage to maritime labor of the FMC ruling is that the ruling would make nearly impossible the maintenance or prompt restoration of industrial peace. The history of Pacific Coast long-shoremen bargaining is a story of great unrest. Continual "quickie strikes" during the 1930's and coast-wide shutdowns lasting several months in the 1940's were destructive to labor and management alike. See C. Larrowe, Shape Up and Hiring Hall ch. 4, 83-138 (1955). The nature of collective bargaining as it exists in this country today requires the ability of both sides to implement promptly the compromise agreements worked out in eleventh-hour bargaining sessions or, as in this case, in hard-fought negotia-

tions following a strike and mediation. The facts of this case are illustrative of the problem: a labor agreement negotiated in 1972 and refined in 1973 has yet to be put into effect more than four years later. The problem is not one of dilatory agency action or judicial backlog, but of procedures unsuited to collective bargaining. Labor peace, a national objective, can not be furthered when the bargaining parties realize that their compromise solutions may be rejected in toto or, even worse, in a piecemeal fashion by a federal regulatory agency whose primary concern is to foster trade competition.

Frustration of the collective bargaining process comes not so much from the possibility that one or more provisions in a collective bargaining pact might be found illegal at some future date under the antitrust laws, or other statutes such as §§ 16 and 17 of the Shipping Act, but rather from the undue and possibly lengthy freezing or stultification of solutions to troublesome labor problems . . . .

Volkswagenwerk, supra, 390 U.S. at 312 (Douglas, J., dissenting).

In New York Shipping Association, supra, the FMC attempted to offset this disadvantage by granting a temporary approval of the assessment formula found to be within section 15 jurisdiction:

<sup>&</sup>lt;sup>27</sup> The Commission points out that PMA neither requested interim approval nor an expedited hearing. In fact, PMA and ILWU obtained extensions of time for filing briefs. FMC Memorandum of March 8, 1976, at 9 n.8.

Labor peace is crucial to the well-being of our maritime industry, and we will take an action which disturbs the peace only when there are no other reasonable alternatives. Here, however, the course is clear, we will grant the assessment formula an interim approval . . . and we will condition our approval upon any adjustments which may be found necessary as a result of the proceeding which we have this day instituted [to determine if the agreement violates sections 16 and 17].

appear to alleviate partially the problem of delayed implementation, they would not solve the problem entirely. The power of the Commission to grant interim approval is currently being litigated. Marine Cooks & Stewards Union v. FMC, No. 75-2012 (D.C. Cir.). Even if this power is affirmed by the court, interim approval does not remove the possibility of later unilateral modification by the Commission and the resultant specter of a final agreement in which the delicate balance struck by the competing interests of labor and management is upset by partial invalidation of the collective bargaining terms."

Section 15 jurisdiction also differs from antitrust procedures as to the penalties imposed. Bargaining agreements found to be outside the antitrust exemption face treble damages, no small deterrent to parties which stray too near the nebulous border between legitimate bargaining and Sherman Act violations. Nevertheless, the penalty reflects the actual damages suffered, though multiplied in the reflection. In contrast, Shipping Act penalties may fall numerous times upon bargaining contracts. Under section 15 failure to file a covered agreement may result in a \$1,000 per day fine. In addition, a civil penalty of \$5,000 per day may be assessed for each violation of the provision against discriminatory practices, 46 U.S.C. § 815 (Supp. 1974), or discriminatory rates, 46 U.S.C. §§ 815, 831(a) (Supp. 1974). With FMC lightning threatening to strike twice in the same agreement, carrier employers 20 would no doubt err in favor of filing all agreements with potential anticompetitive results, thus further disrupting the course of negotiations. This is particularly true since the FMC, in recognizing the complexities of the labor/ antitrust exemption, has stated that its four criteria are merely rules of thumb, that failure to meet any

recommendation of Hearing Counsel and the Department of Justice to exempt collective bargaining agreements from section 15 by means of a rulemaking proceeding. Boston II, supra, 16 F.M.C. at 15. Despite a promise that "[t]his we intend to do," no rulemaking has been forthcoming. Instead, the Commission has appeared to expand its claim of jurisdiction in New York Shipping Association and the case before us. See Pacific Maritime Ass'n, Doc. No. 72-48 (FMC, Jan. 30, 1975), J.A. at 533 n.20 (Morse, Comm'r, dissenting).

The FMC appears to be claiming jurisdiction over the agreement, but not over the union as a "common carrier by water or other person subject to this chapter." 46 U.S.C. § 814 (1970); FMC Memorandum, supra at 8 n.7. See also note 31 infra; cf. Pacific Maritime Ass'n, Doc. No. 72-48 (FMC, Jan. 30, 1975), J.A. at 533 n.19 (Morse, Comm'r, dissenting) ("ILWU is clearly neither of the described type of persons.").

one of them might result in denial of the exemption, and that the determination will be made on a "case-by-case ad hoc basis." See, e.g., Boston II, supra, 16 F.M.C. at 12; New York Shipping Association, supra, 16 F.M.C. at 390; and Pacific Maritime Association, Doc. No. 72-48 (FMC Jan. 30, 1975), J.A. at 522.

Such burdens should not be imposed lightly by either the Commission or the courts, particularly since congressional direction in the statute does not clearly require this result. The Supreme Court's decision in Volkswagenwerk construed section 15's definition of agreements broadly, stressing that the Alexander Report <sup>30</sup> intended government scrutiny of "the myriad of restrictive agreements". 390 U.S. at 276. That agreement, however, was one among employers: common carriers, stevedoring contractors, and marine terminal operators. The Court rejected

the argument that filing of this separate employer contract would unjustifiably impinge upon labor concerns. The union had a substantial interest in setting the amount of the mechanization fund established by collective bargaining, but had agreed to leave to the association the method for assessing members their share of the cost. The Court cautioned, however, that

[i]t is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in

so See text at note 12 supra.

<sup>&</sup>lt;sup>31</sup> An argument was made in *Volkswagenwerk* that the agreement was not within the statutory definitions of section 15 which covers agreements between "every common carrier by water, or other person subject to this chapter" and "another such carrier or other person subject to this chapter." See Volkswagenwerk Aktiengesellschaft v. FMC, 371 F.2d 747, 752 (D.C. Cir. 1966). Section 801 provides in relevant part:

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

<sup>46</sup> U.S.C. § 801 (1970). The Commission assumed that both PMA and Marine Terminals Corporation were covered by the

definition, but denied section 15 jurisdiction over the agreement. In reversing, the Supreme Court was silent on the issue. This silence may reflect an acceptance of the FMC assumption of coverage or the theory later propounded by FMC that the presence of a non-covered party in the agreement does not destroy jurisdiction over the agreement. See New York Shipping Ass'n, 16 F.M.C. 381, 388-89 (1973), aff'd sub nom. New York Shipping Ass'n v. FMC, 495 F.2d 1215, 1220 (2d Cir. 1974). Contra United Stevedoring Corp. v. Boston Shipping Ass'n, 16 F.M.C. 7, 17-21 (Morse, Comm'r, concurring and dissenting).

this opinion is to be understood as questioning their continuing validity.

390 U.S. at 278 (emphasis added). To expand the holding in Volkswagenwerk to cover an agreement negotiated between union and management is to ignore the caveat of the Court and the legislative history of the Act. Although the Shipping Act did not pre-date collective bargaining in the maritime industry," no mention of labor agreements appears in the discussion of problem agreements to be regulated by the federal agency. Instead, the Alexander Report stresses the need for supervision of "all agreements or arrangements which steamship lines may have entered into with other steamship lines, with shippers, or with other carriers and transportation agencies." Alexander Report, supra at 418 (emphasis added).

We are, of course, aware that our holding in this case creates a barrier between FMC jurisdiction over labor-related agreements, as in *Volkswagenwerk*, and labor-management negotiated agreements. Justice Harlan, who foresaw the problem in his concurring opinion in *Volkswagenwerk*, felt that a labor agreement could raise both labor and shipping concerns. 390 U.S. at 291 n.7. He also recognized, however,

that reconciling multi-employer collective bargaining and regulation of shipping competition is a problem of line-drawing. Judicial line-drawing is always a difficult task, and in areas of converging statutory schemes the differences between cases on either side of the line may be muted by the similarities. An argument can be made, undoubtedly, that a separation is arbitrary which permits the FMC to oversee employer agreements intended to fulfill a collective bargaining obligation but denies this approval procedure for the bargaining agreement itself. While we might prefer a rule that more adequately protects labor negotiations from the very real, if more distant, interference permitted in Volkswagenwerk, we see no valid purpose in extending that rule to encourage immediate disruption of negotiations. Exempting collective bargaining agreements as a class from section 15 is the best method to reconcile these conflicting labor and shipping objectives.

Even if we were to adopt the balancing test suggested by Justice Harlan, the agreement at issue would be exempt from filing. The agreement challenged in Volkswagenwerk assessed fees to employers on the basis of tonnage handled, tonnage being determined by weight or measurement depending upon the manifesting custom for each type of cargo. Almost all the employers passed these costs on to their customers, thus causing the assessment to fall disproportionately on shippers who transported automobiles by nonmember charter and common carriers. In this way, the agreement produced discriminatory

For example, unionization among New York longshoremen was sufficient in 1874 to organize a five-week strike seeking higher wages. By 1914, New York locals united within the International Longshoremen's Association and, by 1916, the ILA secured a port-wide agreement. Similarly on the West Coast, an agreement obtaining wage increases from all Seattle area employers was signed in 1915. C. LARBOWE SHAPE-UP AND HIRING HALL, chs. 7-9, 87-89 (1955).

tariffs—a primary concern of the Act—for the shipping of automobiles."

In contrast, Supplemental Memorandum of Understanding No. 4 is challenged not because it will compel discriminatory rates, but because it will allegedly force nonmembers into accepting the same wage, fringe benefit and work stoppage terms as those negotiated by the multi-employer unit. Although the parties vigorously dispute the proper interpretation of the terms of Supplemental Memorandum No. 4 and the subsequent Revised Agreement, as well as the intent of the parties to the agreement, the

nonmembers' argument boils down to an accusation that they are being forced against their wills into a multi-employer unit. FMC has thus accepted jurisdiction to determine shipping implications of an agreement which perhaps imposes an improper bargaining unit. We do not believe that the Shipping Act pre-implementation approval provision was intended to cover problems so clearly within the realm of National Labor Relations Board expertise. The NLRB practice of certifying multi-employer bargaining units has been approved by the Supreme Court in general 36 and for the maritime industry in particular. 87 Similarly, there can be no question that the NLRB has more experience in interpreting contested bargaining terms than the FMC. At worst the case presents Pennington considerations. See text at notes 20-21 supra. These labor issues do not, of course, automatically assure NLRB exclusivity. A divided Supreme Court has ruled against primary jurisdiction in the NLRB for anticompetitive agreements. See Connell Construction, supra, 421 U.S. at

<sup>&</sup>lt;sup>33</sup> Compare New York Shipping Ass'n v. FMC, 495 F.2d 1215, 1220 (2d Cir. 1974) in which the union-labor agreement involved an assessment formula. While we agree with the Second Circuit that the contents are like those of the Volks-wagenwerk, we cannot accept the conclusion that active negotiation of the agreement by the union is "a distinction without a difference." 495 F.2d at 1220. Unlike the Second Circuit we face not only a different type of agreement, cf. id. at n.11, but one which has been stalled for several years by FMC action.

We note also that, while the agreement in New York Shipping is similar in terms to one over which this court assumed jurisdiction, see Transamerican Trailer Transport, Inc. v. FMC, 492 F.2d 617 (D.C. Cir. 1974), the Transamerican decision involved the agreement between employers, not that negotiated between union and the multi-employer unit.

<sup>&</sup>lt;sup>34</sup> The parties disagree, for example, as to whether the agreement compels identical terms on all bargaining topics, whether labor is available outside the joint hiring hall, and whether the union has agreed to impose PMA/ILWU terms on all nonmember employers.

<sup>&</sup>lt;sup>35</sup> Compare Affidavits of Alex Parks, Counsel for Intervenor Ports, and Milton Mowat, Manager, Port of Portland, J.A. at 85-125 with Affidavit of Edmund Flynn, PMA President,

and Fred Huntsinger, ILWU Negotiator, J.A. at 169-211, 216-18.

<sup>&</sup>lt;sup>36</sup> Congress intended "that the Board should continue its established administrative practice of certifying multiemployer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future."

NLRB v. Truck Drivers Local 449, 353 U.S. 87, 96 (1957), quoted in Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 283 (1968).

at 353 U.S. at 94.

633-34; Jewel Tea, supra, 381 U.S. at 685-88. While the Court recognized the expertise of the NLRB on matters such as determining whether certain negotiating topics were mandatory, it believed that the ultimate question of whether antitrust policies overrode collective bargaining objectives was properly one for the judicial process. In noting the strong labor considerations involved in the case before us we are not advocating exclusive jurisdiction for the NLRB; rather we are removing from the FMC the "primary jurisdiction" inherent in the pre-approval system of the Shipping Act for labor agreements concerned with uniform fringe benefits and work stoppage policies. We agree with the Supreme Court that courts, and not labor or shipping agencies, are best suited to balancing the conflicting interests of the acts which these agencies must enforce. In the case sub judice, antitrust cases raising identical claims are the proper forums for resolution of the issue. See note 11 supra.

In rejecting section 15 jurisdiction over these agreements, we do not insulate them from the antitrust laws or from FMC scrutiny. As the Court has frequently observed, "[T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." Pennington, supra, 381 U.S. at 665.

Despite the inappropriateness of section 15 procedures for collective bargaining agreements, shipping concerns are clearly evident in the possibility that the actual implementation of the agreement will re-

sult in discriminatory practices or rates against the complaining ports. The concept of section 15 jurisdictional prerequisites different from those of sections 16 and 17 is not novel. The Act itself provides for FMC consideration of individually-imposed discriminatory rates and practices as well as approval of inter-carrier agreements. Although the FMC must assure facial compliance with sections 16 and 17 before approving submitted agreements under its mandate to disapprove agreements "in violation of this chapter," it has continuing jurisdiction over approved agreements " to ensure that implementing practices do not violate the prohibitions against discriminatory rates and practices. 46 U.S.C. § 814 (1970). See also Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 65 (1970); Memorandum of Law of Hearing Counsel, Doc. No. 72-48 (FMC, Dec. 15, 1972), J.A. at 74." Justice Douglas, dissenting in Volks-

<sup>\*\* &</sup>quot;The Commission shall . . . disapprove, cancel or modify any agreement, . . . whether or not previously approved by it, . . . in violation of this chapter . . . ." 46 U.S.C. § 814 (1970) (exphasis added).

Should these various collective bargaining agreements be fould lawful by the courts despite the Pennington case, we submit, and the parties carry out specific practices which may unduly prejudice the ports or cargo in violation of section 16, or may constitute unreasonable practices under section 17 of the Shipping Act, Shipping Act concern may become substantial and the obligations of members of the PMA under the Shipping Act (and also the ILWU as "any other person" under section 16) may have to be determined by the Commission.

J.A. at 74.

under sections 16 and 17 for practices growing out of an agreement that might be exempt from filing under Section 15. 390 U.S. at 314. Although Justice Harlan's separate concurrence rejects this suggestion, id. at 285-86, his opinion, and that of the majority, acknowledges the difference between "labor agreements" and "labor-related agreements" and that the difficult line-drawing involved in these cases depends upon the type of agreement involved.

FMC jurisdiction under sections 16 and 17 must still accommodate labor concerns and the exemption borrowed from antitrust law would appear to be the proper limit on that jurisdiction. Unlike the prior approval strictures of section 15, sections 16 and 17 impose penalties after-the-fact and do not interrupt industrial peace by forbidding or postponing implementation of collective bargaining terms. Like the antitrust laws, they protect the shipping industry from predatory rates and practices and are thus suitable tools for controlling Shipping Act violations which result from labor-management conspiracies.

Because the FMC order before us is a finding of jurisdiction under section 15 only, we need not determine at this time whether the Boston II four-prong test accurately reflects the labor/antitrust exemption carved out by the Supreme Court. We would caution the Commission, however, that parsing the Court decisions in this highly complex area may over-simplify the balancing process required and create a legal conundrum in which the total exemption is still greater than the sum of its parts.

In resolving the narrow issue before us, we have not ignored the antitrust/shipping overlap that our decision will create. Labor agreements not subject to section 15 approval may not obtain the benefit of the antitrust exemption provided in that section. See generally Carnation Co. v. Pacific Westbound Conference, supra. See also Volkswagenwerk, supra, 390 U.S. at 274 n.20 ("Any agreement subject to § 15 filing that is not both filed and approved is not only illegal under § 15 but also subject to attack under the antitrust laws.") These agreements could thus be in violation both of sections 16 and 17 and of the antitrust laws, even though shipping considerations might outweigh the general applicability of Sherman Act principles. The Cunard-Carnation line of cases reveals a judicial willingness to defer to the expertise of the FMC within the limited antitrust exemption created. We are confident that, when the issue is presented squarely, the established principles of reconciling competing statutes will guide the courts in carrying out the objectives of both. Whether this is best accomplished through the doctrine of primary jurisdiction," through creation of a nonstatutory exemption for shipping as was done for labor," or through allowing injured parties the choice of remedies " is not required by the posture of the case before us.

<sup>&</sup>quot; See text at notes 12-14.

<sup>41</sup> See text at notes 15-23.

See Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 224 (1966).

#### IV. CONCLUSION

Like the holdings in the three lines of cases summarized above, this case must turn finally on a matter of linedrawing. We believe that the facts of this case clearly distinguish themselevs from Volkswagenwerk and thus require a different result. Agreements between labor and management, while subject to antitrust and shipping legislation, cannot be fitted into the pre-implementation approval procedures of section 15 without ignoring the national policy fostering industrial peace through collective bargaining. We therefore reject the finding of FMC jurisdiction under section 15 and the case is hereby remanded to the Commission for further proceedings consistent with our opinion.

So ordered.

### APPENDIX B

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 75-1140

PACIFIC MARITIME ASSOCIATION, PETITIONER

27.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATION PORTS OF ANACORTES, ET AL., INTERVENORS

No. 75-1215

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petitions for Review of an Order of the Federal Maritime Commission

Before: WRIGHT, McGOWAN and TAMM, Circuit
Judges
JUDGMENT

These causes came on to be heard on petitions for review of an order of the Federal Maritime Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that these cases are hereby remanded to the Federal Maritime Commission for further proceedings, consistent with the opinion of this Court filed herein this date.

Per Curiam For the Court George A. Fisher Clerk

By: /s/ Robert A. Bonner ROBERT A. BONNER Chief Deputy Clerk

Date: August 27, 1976 Opinion for the Court filed by Circuit Judge Tamm.

#### APPENDIX C

# FEDERAL MARITIME COMMISSION

### Docket No. 72-48

PACIFIC MARITIME ASSOCIATION—COOPERA-TIVE WORKING ARRANGEMENTS; POSSI-BLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

The ILWU-PMA Nonmember Participation Agreement between the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union is subject to the jurisdiction of the Federal Maritime Commission under section 15 of the Shipping Act, 1916.

The ILWU-PMA Nonmember Participation Agreement is not "labor exempt".

Thomas J. White, Norman E. Sutherland, Alex L. Parks, Manley B. Strayer, Cleveland C. Cory, and Gary R. Bullard for Petitioner Ports.

Edward D. Ransom and Robert Fremlin for Pacific Maritime Association.

Norman Leonard for International Longshoremen's and Warehousemen's Union.

Thomas N. Gleason for International Longshoremen's Association.

Gerald Grinstein, Michael P. Crutcher, Louis F. Nawrot, Jr., Robert A. Koelker, and Richard F. Ford for Port of Seattle.

Francis Scanlan and C. P. Lambos for North Atlantic Shipping Association.

Paul J. Kaller and Donald J. Brunner as Hearing Counsel.

### REPORT

BY THE COMMISSION: (Helen Delich Bentley, Chairman; James V. Day, Vice Chairman; Ashton C. Barrett and George H. Hearn, Commissioners)

## Background

This proceeding was instituted to determine whether a master collective bargaining contract and a Supplemental Memorandum of Understanding No. 4 (SMU 4), entered into by the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union (ILWU), embody any agreements between and among the members of PMA which are subject to the requirements of section 15 of the Shipping Act, 1916 (the Act); whether the implementation of these contracts by the PMA and the ILWU would result in any practices which are violative of sections 16 and 17 of the Act; and finally, whether there are any labor policy considerations which would operate to exempt such agreements or practices from any provision of the aforementioned sections of the Shipping Act, 1916.

The Commission's investigation was initiated at the request of the petitioner ports, who maintain that the subject agreements, providing for the employment of longshore labor, are "agreements" within the meaning of section 15 of the Act, which should have been filed for Commission approval pursuant to that section.

On October 19, 1972, the Commission issued its First Supplemental Order Severing Jurisdictional Issues. In that Order, the Commission decided to determine separately the matter of its jurisdiction under section 15 over the subject agreements. Additionally, the Commission advised therein that it would consider whether any labor considerations would operate to exempt those agreements or the practices resulting therefrom from the provisions of sections 15, 16, and 17 of the Act.

Thereafter, petitioner ports submitted a revised version of the SMU 4, entitled "ILWU-PMA Non-member Participation Agreement", which was made part of the collective bargaining agreement under consideration in this proceeding. In its Second Supplemental Order Consolidating Jurisdictional Issues, served January 30, 1974, the Commission found that the "ILWU-PMA Nonmember Participation Agreement"," was the same in all its substantive essentials

<sup>&</sup>lt;sup>1</sup> The Ports of Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, Portland and Tacoma.

For the sake of convenience we will refer to the ILWU-PMA Nonmember Participation Agreement as the Revised Agreement. The Revised Agreement, like its predecessor SMU 4, requires that: (1) nonmembers join the PMA for an indefinite period as a condition to the direct employment of any member of the joint PMA-ILWU work force; (2) any separate contract with ILWU conform to the provisions of the Revised Agreement and the Pacific Coast Longshore and Clerks Agree-

as the SMU 4, "... the only difference between the two being that the revised agreement was embodied in the master collective bargaining agreement between the PMA and ILWU." The Commission pro-

ment; (3) nonmembers employ members of the joint work force only through PMA allocation procedures and the ILWU-PMA dispatching halls; (4) nonmembers pay dues and assessments and accept proportional liability as to obligations of the PMA; and (5) nonmembers adhere to PMA decisions as to work stoppages, strikes and lockouts.

"the only difference" between SMU 4 and the Revised Agreement is that the latter "is embodied in the master collective bargaining agreement". PMA believes that this language may create the false impression that "there was some difference in treatment of the nonmember participation agreement in 1973 by PMA and ILWU in order to avoid FMC jurisdiction over the agreement." PMA, in order "to dispel any notion" which may arise from the Commission's statement, point out that while the Revised Agreement was physically incorporated into the 1973 master collective bargaining agreement whereas SMU 4 was simply made a supplement to the 1972 master collective bargaining agreements, the agreements are not at all unlike since both form part of their respective master collective bargaining agreements.

While we do not share PMA's concern that the challenged language in our Second Supplemental Order may create misleading impressions, in order to allay PMA's fear and to avoid any further misinterpretation, we wish to state on the record that we have never doubted that either SMU 4 or the Revised Agreement was part of the master collective bargaining agreement in effect at the time, nor was it our intention to question the parties' motives in treating the two agreements differently. In fact, however, PMA's apprehension is nonconsequential since either method of incorporation has the same effect. It is the substance, and not a change in form, of the agreement with its corresponding impact upon employers in the industry that concerns the Commission.

posed, therefore, to (1) grant the supplemental petition of the petitioner ports, and (2) include the "ILWU-PMA Nonmember Participation Agreement" in the current deliberations rising out of the First Supplemental Order. In order to accord every possible due process, parties were afforded an additional opportunity to address themselves to these actions by the Commission. The comments submitted in response thereto have been fully considered by the Commission and found, for reasons stated below, not to dissuade us from our earlier views.

Before addressing ourselves to the jurisdictional question at issue here, we should first like to dispose of a preliminary matter raised by Hearing Counsel. Hearing Counsel have suggested that because the master collective bargaining agreement, including the Revised Agreement, "invoive antitrust and related labor policies" and require a determination of whether parties engaged in collective bargaining have exceeded the scope of legitimate bargaining, the Commission should defer jurisdiction to either the NLRB or the courts and await their decision. If the agreements are found lawful, Hearing Counsel would then have the Commission examine the implementation of the agreements in the light of sections 16 and 17 of the Act.

As we noted in New York Shipping Association—NYSA-ILA Man-Hour/Tonnage Method of Assessment; Possible Violation of Sections 15, 16 and 17, Shipping Act, 1916, 16 F.M.C. 381, 397-398 (1973), the matter of deferring the legality of a bargaining

agreement to the exclusive primary jurisdiction of the NLRB was presented to, and disposed of by, the Supreme Court in Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676 (1965). In Jewel Tea, it was alleged that the union and other retail stores had conspired to prevent the retail sale of meat before 9:00 a.m. and after 6:00 p.m. The prohibition was contained in a collective bargaining agreement, and the question of the "labor exemption" from the antitrust laws was presented. The union attacked the appropriateness of the District Court's jurisdiction on the ground that the controversy was within the exclusive primary jurisdiction of the NLRB. The Supreme Court rejected this contention on the ground that the NLRB jurisdiction was primarily restricted to the policing of the collective bargaining process and was not concerned with the substantive merits of the agreement once it was signed. As it was in the New York Shipping case, this holding is dispositive of the suggestion made here that we defer jurisdiction over the Revised Agreement to the NLRB.

Before us is a complaint that alleges not that the parties have refused to bargain, but rather that they have entered into an agreement in violation of the shipping and antitrust laws. As a result, the NLRB is without "available procedure" to investigate the legality of the "ILWU-PMA Nonmember Participation Agreement". This Commission, however, has

been vested with authority over the approvability of this agreement and the exercise of such authority is consistent with the principle of primary jurisdiction as acknowledged by the Court in the Jewel Tea case that preliminary resort should be had to the agency which administers the statutory scheme in order to protect the integrity of that scheme. See Port of Boston Marine Terminal Assn., et al. v. Rederiaktie-bolaget Transatlantic, 400 U.S. 62 (1970).

Hearing Counsel's alternate suggestion that the Commission defer the present matter to the courts is equally without merit. Since the Commission has already intervened in the counterpart District Court case and requested that court to stay its proceeding therein, which it has done, until the Commission has had an opportunity to pass upon the status of pertinent agreements under the Shipping Act, it would be both inconsistent and counterproductive for us to now ask that the matter be litigated before the court. More importantly, we believe that consideration of the Revised Agreement in light of the requirements of the Shipping Act is a legitimate concern of this Commission and one that is properly before us. The Commission simply cannot defer to the courts matters which are so intricately involved with its responsibilities under the shipping statutes. As we said in United Stevedore Corp. v. Boston Shipping Association, 16 F.M.C. 7 (1972), when establishing the applicable criteria, a labor-related agreement:

<sup>\*</sup> See discussion of Supreme Court on this point in Meat Cutters Union v. Jewel Tea Co., supra, at page 687.

it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement.

Accordingly, we believe that under the circumstances this would be an inappropriate case for the Commission to withhold its determination out of deference to the "expertise" of either the NLRB or the courts. With this in mind, we proceed with a discussion of the jurisdictional issues involved.

Initially, Respondent PMA and Intervenors ILWU and CONASA araised the same objections to the Commission's jurisdiction over the parties to the master collective bargaining agreement as were advanced by NYSA in New York Shipping, supra. Specifically, these parties contend that: (1) since PMA is an association with some members who are not "common carriers" or "other persons subject to this Act", and (2) since one of the parties to the collective bargaining agreement is a labor union, the Commission has no jurisdiction over the agreement.

These arguments were not only laid to rest by this Commission in our decision in the New York Shipping case, supra, but also rejected by the court in NYSA and ILA v. FMC, 495 F.2d 1215 (2nd Cir. April 8, 1974), cert. denied. — U.S. — (October 29, 1974). In supporting the Commission's jurisdiction over a multiemployer bargaining association and the agreement entered into among its members, the court there stated:

We find the merits considerably less difficult than the issue of reviewability; indeed, given the decision in *Volkswagenwerk* [390 U.S. 261 1968)], we see no need for making such heavy weather on the subject as the Commission did. [Footnote omitted.]

The assessment agreement fits the definition of § 15 since it imposes obligations on common carriers by water and other persons subject to the Shipping Act, to wit, terminal operators, see 49 U.S.C. § 801. An agreement to which such persons are parties is not taken out of § 15 by the fact that persons not fitting that definition, to wit, stevedoring contractors who are not terminal operators, are also bound. Volkswagenwerk established that an agreement among water carriers, stevedoring contractors and terminal operators allocating assessments for benefits negotiated with a longshoremen's union requires approval under § 15. The FMC took jurisdiction of T-2390, the predecessor of the present assessment formula, apparently without objection, and directed certain modifications; its action has been sustained, without any suggestion that the FMC

For the sake of convenience, PMA, the ILWU and the Council of North Atlantic Shipping Associations (CONASA) will hereinafter be collectively referred to as "Respondents".

lacked jurisdiction over the agreement, in a comprehensive opinion by the District of Columbia Circuit, Transamerican Trailer Transport, Inc. v. FMC, supra. The petitioners urge that the present case is distinguishable on the basis that the agreements in Volkswagenwerk and Transamerican Trailer Transport were solely among stevedoring contractors, terminal operators and carriers, while the ILA took an active part in negotiating and is a party to the agreement here at issue. This is a distinction without a difference. To be sure, the FMC has no concern with so much of the agreement as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters. But even though we fully accept that the ILA has an important stake in the existence of a workable and reliable assessment formula, this does not relieve the FMC of its duty to determine whether the formula is reasonable in its effects on shipping. That inquiry is just as important as under the predecessor agreement and under the agreement in Volkswagenwerk. (Id., pages 27, 35-36)

Further, we find that the Revised Agreement before us is factually substantially similar to the assessment agreement which the Supreme Court found subject to section 15 in Volkswagenwerk v. FMC, supra. Consider the parallels. In Volkswagen: (1) the ILWU and the PMA had laboriously negotiated on the establishment of the Mech Fund, which, in part, liberalized the union's fringe benefit program, (2) the only interest of the ILWU was to insure that

payments were made into the fund, and (3) the PMA wanted to reserve to itself how the payments were computed and the ILWU left that to PMA. Here, (1) PMA and the ILWU have stated on the record that they have over a period of years negotiated a program of fringe benefits and that this program was supported by the payments of both members and nonmembers of the PMA, (2) the only interest of the ILWU is allegedly to assure that all industry users of ILWU labor made payments into the fringe benefit fund, and (3) PMA wants to reserve to itself all control of industry users of labor.

In spite of these obvious similarities, Respondents here contend that the rationale of the Volkswagen case is inapplicable here because the assessment agreement under consideration in Volkswagen was exclusively concerned with "the relationship between association members and their customers", while SMU 4 and its successor, the Revised Agreement, involve matters of fundamental concern to the union and its members.

Whatever be the merits of this argument, PMA itself readily admits that the purpose of the supplemental agreement is to do away with the "free ride" previously enjoyed by Petitioners and other similarly situated ports and to place nomembers on the same

<sup>\*</sup>Petitioners, however, continually allude to the lack of any "legitimate" interest of the ILWU in the PMA's attempt to control the "competition between members and nonmembers".

"competitive" basis as members of the PMA. In short, the effect of the Revised Agreement is to control or affect competition between members and nonmembers.' Section 15 of the Shipping Act specifically subjects to Commission jurisdiction all agreements between persons subject to the Act which control, regulate or prevent competition." Thus, we conclude that the Revised Agreement must be filed for Commission approval unless it is entitled to a "labor exemption"." For reasons stated below, we find that the Revised Agreement is not entitled to such an exemption.

The nature and scope of the so-called "labor exemption" from the antitrust and shipping laws have been considered and discussed at considerable length by the Commission in its decision in Boston Shipping, supra. In that case the Commission, in reviewing three labor-related agreements, applied doctrines of law which had evolved through the courts in a number of cases arising under the antitrust laws. Recognizing the judicially-accepted principle that the fruits of collective bargaining are generally excepted from the application of the antitrust statutes, the Commission explained therein that:

The "labor exemption" originated in the area of accommodation of the labor laws and the antitrust laws. To preclude the application of the antitrust laws to various collective bargaining agreements entered into between labor and management, the courts carved out of the antitrust laws a "labor exemption", by means of which such agreements were held to be immune from attack under antitrust laws. Thus, the analogy to a "labor exemption" from the shipping laws is obvious. (16 F.M.C. 11)

holding under NLRB concepts would be equally applicable to our responsibilities under the Act. Consequently, while we can agree with Seattle that the Revised Agreement within the collective bargaining contract is the *only* agreement among and between members of PMA having section 15 ramifications, there still remains the question of the legality of the agreements among and between members of PMA under sections 16 and 17 of the Act. For this reason, we are denying Seattle's petition. For purposes of this interlocutory proceeding, however, we are hereinafter limiting our discussion solely to the Revised Agreement.

In response to our Second Supplemental Order, all the parties to this proceeding have incorporated by reference their remarks concerning SMU 4 and have asked the Commission to apply them equally to the Revised Agreement. Consequently, we have substituted the term "Revised Agreement" wherever an argument was used with reference to SMU 4.

<sup>\*</sup>PMA, for example, would bind nonmembers to PMA "lockouts", thus preventing a nonmember from continuing operations while members' facilities are shut down.

<sup>\*</sup>Seattle has presently petitioned for severance and stay from this proceeding all issues relating to the master collective bargaining contract except for the Revised Agreement. Because the Revised Agreement is different in operation from the remaining sections of the collective bargaining contract, Seattle maintains that the latter is immaterial to the Commission's concern, especially since it raises issues already decided by the NLRB. (See ILWU, et al., and California Cartage Company, et al., 208 NLRB No. 124 (February 15, 1974), wherein the NLRB found a substantial portion of the master collective bargaining contract unlawful.) As heretofore mentioned, because there are involved in the National Labor Relations Act and the Shipping Act, 1916 (the Act) two different purposes, it would not necessarily follow that a

In determining whether labor-related agreements are subject to the provisions of the Shipping Act, 1916, or "labor exempt", the Commission has advised that just as in the courts' accommodation of the labor laws and the antitrust laws, it would proceed on an ad hoc case-by-case basis and apply "the various criteria" evolved in the courts as guidelines or "rules of thumb" for each factual situation. As detailed in the Boston Shipping case, these criteria are as follows:

1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball".

2. The matter is a mandatory subject of bargaining, e.g., wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

3. The result of the collective bargaining does not impose terms on entities outside of the col-

lective bargaining group.

4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management.

Failure of an agreemnt to meet any one of these criteria is sufficient to consider withholding a labor exemption. As we explained in the Boston Shipping case, "[t]hese criteria are by no means meant to be exclusive nor are they determinative in each and every case." (16 F.M.C. 12)

There is considerable factual conflict among the affidavits from officials of various organizations and purported "notes" taken at PMA meetings as to whether the Revised Agreement was the simple product of, as PMA asserts, "eyeball to eyeball" good faith bargaining or, as contended by Petitioners, was insisted upon by PMA "as a part of its longrange program to force all persons and entities utilizing longshore labor to join PMA as a member and to subcribe to and follow PMA's labor policies." Whatever be the merits of the parties' arguments, we need reach no conclusions on this issue since our finding that the Revised Agreement is not entitled to a labor exemption rests entirely on other grounds.

As to the second criteria, sections 8(a)(5) and 8(d) of the National Labor Relations Act (49 Stat. 452) define the "mandatory" issues of collective bargaining as "wages, hours, and other terms and conditions of employment". Although the National Labor Relations Act does not define what constitutes "terms and conditions of employment", other than wages and hours, the NLRB, with the approval of the courts, has initiated a system of classification by dividing subjects of bargaining into three categories: mandatory, permissive and illegal. Whether or not a subject of bargaining is mandatory or permissive depends upon the extent to which the agreement addresses itself to the labor relations of the contract

employer, vis-a-vis his own employees. Obviously, while union and management may bargain on mandatory and other issues, this does not necessarily mean that any agreement concluded will not violate the antitrust laws and/or the Shipping Act.

Petitioners submit that at best the subject of the Revised Agreement is permissive only. In support thereof, Petitioners advance a three-prong argument, the substance of which alleges that the ILWU gained nothing that it did not already have by the terms of the overall PCLCA.11 Petitioners first contend that, notwithstanding the Revised Agreement, nonmembers would continue to contribute to the fringe benefit programs in the same amounts as PMA members and signified their willingness to continue to do so. Secondly, they maintain that while the Revised Agreement resolved the "problem" of "steady men" by requiring uniformity with PCLCA's provisions, this was in actuality PMA's problem and not that of the ILWU, who allegedly had no interest therein. Finally, Petitioners argue that the requirement that participating nonmembers would pay dues and assessments into PMA to support labor relations programs and would adhere to PMA labor policies had no relationship to "hours, wages, or working conditions".12

Thus, Petitioners' position here is that the issue here does not involve altering or modifying the wages, hours or working conditions of the ILWU—areas which would understandably be of primary concern to the union—but rather involves the matter of what a nonmember must agree to as a condition to directly employing ILWU labor.

Respondents argue that contrary to the belief of Petitioners, the Revised Agreement relates directly to a mandatory subject of bargaining. Moreover, Respondents point out that there has been a long bargaining history of nonmember participation in both the PMA-ILWU hiring hall and fringe benefit systems.<sup>13</sup>

The Revised Agreement, insofar as it changes the treatment of "steady men" and requires all direct hiring to be in accordance with PMA procedures, obviously affects hours or working conditions. The question is, however, whether the agreement is directed to the labor relations of the contracting em-

Nat'l Woodwork Manufacturing Assoc. v. NLRB, 386 U.S. 612 (1967).

which established the PMA-ILWU joint work force in 1935, is the basic collective bargaining agreement which has been amended to include a Memorandum of Understanding in which the Revised Agreement is a part thereof.

<sup>&</sup>lt;sup>13</sup> This conclusion is primarily founded upon the remarks of Mr. Flynn, President of PMA, to wit:

A nonmember share is measured by all the obligations included in the nonmember participation agreement, not just a monetary contribution (p. 9 of Mr. Flynn's affidavit).

<sup>&</sup>lt;sup>13</sup> See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 211 (1964), wherein the Court held that in determining whether or not a matter is a mandatory subject of bargaining, it is appropriate to consider bargaining history.

ployer, vis-a-vis his own employees. We think not. Since the primary purpose of the Revised Agreement is to bring nonmembers into the PMA "camp", that it affects the hours or working conditions of some of the members of the ILWU would appear to be only incidental to the main purpose of the agreement. Thus, we can only conclude that the matter of the Revised Agreement is not a mandatory subject of bargaining. While this finding may be sufficient to consider withholding a "labor exemption", our ultimate conclusion that the Revised Agreement is not entitled to a labor exemption rests on additional grounds.

Respondents have devoted much argument in their memorandum to support their contention that the Revised Agreement does not, as Petitioners have insisted, impose such terms upon persons or entities outside the bargaining group as would justify the denial of a labor exemption. In fact, Respondents, in furtherance of their argument that there are "a number of significant differences" between SMU 4 and the Revised Agreement, advise that one of the "changes" incorporated in the Revised Agreement was intended to allay any fears on the part of Petitioners that the Agreement imposed terms on outsiders. Notwithstanding such assurances and for reasons stated below, we agree with Hearing Counsel and Petitioners that the Agreement is specifically designed to compel nonmember entities to join PMA under threat of exclusion from the ILWU work force. As such it clearly imposes terms and conditions upon persons outside the bargaining group.

To "remove any doubt" that the agreement between PMA and ILWU restricted the latter in its bargaining with nonmembers, Respondents explain that the note after Paragraph 3(b) of SMU 4 was deleted from the Revised Agreement. This note provided that:

If a prospective nonmember participant has an agreement with the ILWU which provides for utilization of the joint work force at terms and conditions of employment more favorable to the nonmember than those provided under the PCLCA, including the CFSS [Container Freight Station Supplement], such nonmember must alter the agreement to conform to the PCLCA, including the CFSS, in order to become a nonmember participant.

Seattle and Petitioners view this deletion as being cosmetic only and in no way altering the effects of the agreement. In support of its position that PMA is still utilizing the joint work force as a means of controlling the labor policies of nonmember ports, specific reliance is placed on Paragraphs 2, 3, 6 and 12 of the Revised Agreement, to wit:

- 2. The nonmember participant's separate ILWU contract must conform with the provisions hereof, and the provisions of the PCLCA governing the selection of men for inclusion in the joint work force.
- 3. A nonmember participant will share in the use of the joint work force upon the same terms

as apply to members of PMA. For example a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA,

b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, nonmember participants shall not ob-

tain men from the dispatch hall,

c) if during a work stoppaged by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch hall for PMA members, such limited dispatch shall be available to nonmember participants.

The essence of b) and c) of this section is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against nonmember participants.

- 6. For purposes of 1.53 through 1.57 of the Container Freight Station Supplement (CFSS) of the PCLCA, a nonmember participant who uses the joint work force at terms and conditions of employment no more favorable to the nonmember participant than those provided under the PCLCA, including the CFSS, may be deemed to be a "member of PMA" insofar as it is so using the joint work force.
- 12. the ILWU-PMA Nonmember Participation Agreement shall be binding and continue in effect until terminated on such terms and conditions as may be mutually agreed to by the PMA, the

ILWU and the participant. An entity that terminates its participation shall at such time no longer be eligible to employ men in the joint work force nor to participate in the Pension, Welfare, Vacation and Pay Guarantee Plans existing between ILWU and PMA.

Consequently, while nonmembers are allowed to negotiate separate contracts, the contracts must, nevertheless, conform with the provisions of both the Revised Agreement and the master collective bargaining contract (Paragraph 2). Moreover, and nonwithstanding the further deletion by PMA of Paragraph 9 of SMU 4 from the Revised Agreement, Paragraph 3 of the Revised Agreement still requires, in effect, that nonmembers adhere to PMA labor policies pursuant to a work stoppage by ILWU.

Additionally, Paragraph 6, by providing that if nonmembers use the ILWU work force on terms more favorable than to PMA members, the nonmembers will be deprived use of the PMA-ILWU joint work force, appears to allow for the imposition of work rules on nonmembers.<sup>15</sup>

As a further indication that PMA is still controlling labor policies of nonmembers, we note that the

<sup>&</sup>lt;sup>14</sup> Paragraph 9 of SMU 4 provided that if there were a cessation of work at the end of the contract period of the PCLCA and related agreements, the labor policy of PMA shall continue to apply to nonmember participants, and that nonmember participants shall continue to accept PMA's labor policy as their own.

<sup>&</sup>lt;sup>13</sup> Paragraph 6 of the Revised Agreement is identical in intent to Paragraph 3(b) of SMU 4.

substance of the termination provision of Paragraph 12 of the Revised Agreement is akin to that of Paragraph 13 of SMU 4. Whereas Paragraph 13 provided that a contract could only be terminated by the joint action of PMA and ILWU, Paragraph 12 requires that the nonmember be included as part of this joint action. In effect, therefore, under either paragraph, the nonmember is still bound to the agreement for an indefinite period of time since the nonmember cannot unilaterally terminate the agreement but can only do so upon such "terms and conditions" as may be "mutually" agreed to by PMA and ILWU.

The foregoing, we believe, makes it clear that no substantial differences exist between the old SMU and the Revised Agreement. Whatever revisions were made in the Revised Agreement are changes in form only which in no way substantially alter the effect or impact of the agreement. The effect of the Revised Agreement, we find, is to require entities outside the bargaining group to either submit to its terms or incur the sanctions contained therein, i.e. deny nonmembers participation in PMA hiring halls and fringe benefit funds as well as the use of ILWU labor. In this regard, we agree with Hearing Counsel that the agreements at issue here "bear a striking resemblance" to that found unlawful under the antitrust laws in United Mine Workers v. Pennington, 381 U.S. 657 (1965).

In the *Pennington* case, a group of large employers in the mining industry had agreed with the union to impose its wage and royalty scale on smaller nonunion operators outside the immediate bargaining group. Plaintiff there contended that this scheme was intended to eliminate from competition the smaller mine operators who allegedly could not withstand the costs of the particular terms and conditions of employment which would be forced upon them. The Court concluded that while a union may make wage agreements with a multiemployer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers, it:

when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry. (381 U.S. at pages 665-66.)

We believe that the Court's rationale in Pennington, which is clearly not limited to the imposition of a wage scale but could involve any other labor standard, such as labor relations policy, is applicable to the agreements before us. Instead of a system of computing wages, which because of difference in methods of production would be more costly to one set of employers than another, the PMA and ILWU here have devised a scheme whereby the elimination

of all local agreements between nonmembers and the ILWU would result in higher costs to one set of employers (the nonmembers) than to another (PMA members); particularly, since the differences in methods of operation and locality are ignored.<sup>16</sup>

Respondents read *Pennington* as establishing only the principle that a union may not by agreement with one employer restrict its right to bargain with other employers. Such a reading of *Pennington* is far too restrictive and totally ignores the real issue in the case, i.e., the *imposition* of terms on persons outside the bargaining group. The fact that the scheme employed in *Pennington* required the UMW to surrender its freedom of action is only incidental to the Court's ultimate holding that a union and employers in one bargaining unit "are not free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry". (381 U.S. at 666.)

Even assuming that Respondents' interpretation of Pennington is correct, the Revised Agreement is still clearly inconsistent therewith, as clearly indicated by Paragraphs 2, 3, 6 and 12 of the aforementioned agreement, delineated earlier. Under Respondents' own interpretation of *Pennington*, the Revised Agreement restricts nonmembers' right to bargain and thereby imposes such terms upon entities outside the collective bargaining unit as to preclude the granting of a "labor exemption".

Addressing themselves to the fourth "labor exemption" criterion, Petitioners challenge PMA's contention that "no conspiracy" existed between PMA and ILWU. PMA argues that there is nothing in the Revised Agreement that precludes the ILWU from making whatever arrangements it and the nonmembers can negotiate. Seattle, on the other hand, refers to the ILWU's chief negotiator's remarks during negotiations over SMU 4 that the ILWU would cooperate with PMA and provide PMA with "insurance" against "legal entanglements" if PMA would be cooperative in other areas. In view of our finding here that the Revised Agreement is not entitled to a labor exemption by virtue of the fact that it imposes terms on parties outside the bargaining unit and is not a subject of mandatory bargaining, we find it unnecessary to resolve the merits of the "conspiracy" issue.

In the "final analysis", our assertion of jurisdiction over a labor-related agreement requires, as we noted in Boston Shipping, a consideration of the impact of such agreement on the competitive conditions in the industry, vis-a-vis its impact on the collective bargaining process. On this basis, and taking into

Under its agreement with Local No. 47 in the Olympia area, the local provides, among others, checkers. If the Port were required to abrogate its local agreement and adhere to the requirements of the Coast Agreement, members of the ILWU Checkers' Union in Seattle would have to be employed, thus increasing the cost to the Port of Olympia by the amount of payments for travel time to and from Seattle. The same situation prevails at the Port of Port Angeles. This shift in costs directly affects the Ports' costs of providing terminal services and thereby the rates paid by the shipping public.

consideration several past court decisions 17 involving labor-related agreements, we find that while the Revised Agreement has a minimal effect on the collective bargaining process, it has such a potentially severe and adterse effect upon competition under the Shinning Act as would justify our consideration of its approvability under the standards thereof. Without passing on the individual merits of each of their contentions, we believe that Petitioners have generally demonstrated the possible adverse impact of the Revised Agreement and the effect its implementation could have on their ability to compete with PMA members. As Petitioners have pointed out, their failure to sign the Revised Agreement could well result in the closing of their facilities and the cessation of operations because (1) they will be denied ILWU personnel from the joint hiring hall; (2) if they employ non-ILWU personnel, ILWU personnel utilized by PMA stevedoring companies to load and unload cargo to and from ships will refuse to work the cargo; and (3) the ILWU would undoubtedly put up picket lines at the entrances of all ports' terminals, thus effectively stopping the movement of all cargo being delivered to or taken from such terminals by other union personnel.<sup>18</sup> It follows, therefore, that the implementation of the Revised Agreement, as it may affect the receiving, handling, storing and delivery of cargo at petitioner ports, may involve violations of sections 16 and 17 of the Shipping Act, 1916.

On the other hand, we find that the Revised Agreement has little if any effect on the collective bargaining process. With or without the Revised Agreement, the provisions for fringe benefits, which are the main concern of the ILWU, remain unchanged.

Further, if petitioner ports contracted with PMA stevedoring companies (employing ILWU personnel) to perform all the terminaling services now directly performed by the ports themselves, the ports would be precluded from any decision-making power with respect to the performance of services at their terminals. Consequently, as a practical matter, Petitioners would be delegating to such stevedoring companies all ratemaking decisions, and thus, being profit-motivated, these companies would have discretion and incentive to divert cargo from one port to another by simply granting different rates for each area.

Finally, we should like to point out that we do not view our exercise of jurisdiction over the Revised Agreement as interfering with the collective bargaining process within the maritime industry. Such an

<sup>13</sup> See Allen Bradley Co. V. Local 3 International Brother-hood of Electrical Workers, 325 U.S. 797 (1945); Meat Cutters Union V. Jewel Tea Co., supra; United Mine Workers V. Pennington, supra; Volkswagenwerk V. FMC, supra; and NYSA and ILA V. FMC, supra.

<sup>&</sup>lt;sup>18</sup> Although conceding that longshoremen and clerks are available outside the PMA-ILWU joint work force, Petitioners submit that these types are not suitable for employment as they are unskilled labor; skilled labor can only be gotten from the ILWU work force.

assertion of jurisdiction does not violate the right of employees to bargain collectively through representatives of their choice. Further, we disagree with Respondents that our jurisdiction over the Revised Agreement will preclude the remaining sections of the master collective bargaining agreement from being implemented. At issue here is only the Revised Agreement which we consider severable from other provisions of the master collective bargaining agreement, i.e. the amount and kind of fringe benefits to be paid the union. The obligation of PMA to pay those benefits remains unimpaired. Consequently, the Commission's assertion of jurisdiction will have no effect upon PMA's obligations under the labor contract.

Therefore, weighing the various Shipping Act and labor interests raised by the Revised Agreement, we conclude, consistent with the court's holding and directives in NYSA and ILA v. FMC, supra, that the many and potentially severe shipping problems raised by the Revised Agreement balanced against the minimal impact our regulation thereof would have on the collective bargaining process fully warrants our denial of a "labor exemption" in this proceeding. While the court in NYSA and ILA v. FMC, supra, concluded that on the basis of facts involved therein it was "enough" for the Commission to find that the shipping interests outweigh the labor interests in asserting jurisdiction over a labor-related agreement, we believe that our discussion of the Revised Agreement in light of the four "exemption" criteria, is not only responsive to the pleadings of the parties but also lends additional support to the conclusion reached here.

We are in an area which involves not only the Shipping Act, 1916, but also the antitrust laws and the labor laws, and it becomes a matter of judgment and line drawing in determining whether we should retain jurisdiction <sup>10</sup> or whether we should grant labor exemption and leave the matter for resolution by the courts and the NLRB. Under our decision in Boston Shipping, 16 F.M.C. 7, it remains within our sound discretion whether to grant labor exemption even when an agreement fails to meet one or more of our announced criteria. <sup>20</sup> It is my view that the impact

<sup>19</sup> As to subject matter, the intra-PMA agreement concerning the ILWU-PMA Nonmember Participation Agreement is clearly a section 15 agreement. Whether such agreement meets section 15 standards as to parties is not established on this record and, with due respect to NYSA & ILA v. FMC, supra, I would have fundamental jurisdictional problems if, in fact, "mixed membership" exists within PMA. Under Boston Shipping, it would appear that PMA itself is primarily a collective bargaining unit and should receive labor exemption. However, that does not resolve the problem, for to find existence of a section 15 agreement between "common carriers by water" and "other persons subject to the Act" we must consider the membership of PMA, since the functions of PMA, a corporation, itself are neither that of a common carrier by water nor an "other person subject to the Act". ILWU is clearly neither of the described type of persons.

<sup>&</sup>lt;sup>20</sup> In United Stevedoring Corp. v. Boston Shipping Assoc., 16 F.M.C. 7 at 15 (August 24, 1972) we stated in part: "While we cannot here decide that every such collective bargaining

of the Revised Agreement vis-a-vis the collective bargaining process outweighs the impact of that agreement on the competitive conditions within the industry. In all events, the courts in the pending antitrust cases and the NLRB have far greater expertise in this antitrust and labor law area, and more flexible tools by way of treble damages, injunctive process, and otherwise, than do we to assure that the rights of all interested parties will be duly protected.<sup>21</sup>

I would grant labor exemption and stay our proceedings without prejudice pending resolution of the pending court cases, and if the involved agreements are found lawful by the courts and the parties carry out specific practices in a manner which may violate sections 16 or 17 of the Shipping Act, then Shipping

agreement is entitled to a labor exemption, Hearing Counsel and the Department of Justice recommend the consideration of a section 35 rulemaking proceeding in order to exempt for the future this class of agreements from some or all of the requirements of section 15 of the Shipping Act, 1916, thereby not jeopardizing collective bargaining by any threat of preapproval implementation penalty. This we intend to do." I again ask WHEN is this Commission proposing to initiate such a proceeding?

Act concern may become substantial and the obligations of members of the PMA under the Shipping Act (and also the ILWU as "any other person" under section 16) may have to be determined by the Commission.

/s/ Francis C. Hurney
FRANCIS C. HURNEY
Secretary

[SEAL]

In my opinion, the majority ignore the reality of labor-management relations when they suggest that denial of labor exemption to the Revised Agreement "will have no effect upon PMA's obligations under the labor contract." This is another indication of our lack of expertise in this labor-management field. An earlier example is the Court's reaction stated in its Opinion on Motion to Remand in Boston Shipping Assoc. v. USA (CA-1, No. 72-1004, May 31, 1972) when commenting on our earlier report in United Stevedoring Corp. v. Boston Shipping Assoc., 15 F.M.C. 33 (1971).

#### FEDERAL MARITIME COMMISSION

#### Docket No. 72-48

PACIFIC MARITIME ASSOCIATION—COOPERA-TIVE WORKING ARRANGEMENTS; POSSI-BLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

#### ORDER

The Federal Maritime Commission instituted this proceeding to determine, inter alia, whether the master collective bargaining contract entered into by the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union embody any agreements between and among members of PMA, which agreements are subject to section 15 of the Shipping Act, 1916; and whether there were any labor policy considerations which would operate to exempt such agreements or practices from section 15 of the Shipping Act, 1916. The Commission having this date made and entered its report stating its findings and conclusions with respect thereto, which report is made a part hereof by reference:

THEREFORE, IT IS ORDERED, That pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C.

821), and consistent with the Commission's Order of September 6, 1972, as amended by its Orders of October 19, 1972 and January 30, 1974, the investigation in this docket shall proceed to determine:

1. Whether the "ILWU-PMA Nonmember Participation Agreement" (Revised Agreement), which is embodied in the ILWU-PMA master collective bargaining contract and which we have found to be subject to and must be filed in accordance with the requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814), should be approved, disapproved, or modified pursuant to that section;

2. Whether the implementation by PMA and the ILWU of the provisions of the Revised Agreement and/or the master collective bargaining agreement will result in any practices which will subject any person, locality or description of traffic to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act, 1916 (46 U.S.C. 815):

3. Whether the implementation by PMA and ILWU of the provisions of the Revised Agreement and/or the master collective bargaining agreement will result in any practice which is unjust or unreasonable in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. 816);

4. Whether any labor policy considerations would operate to exempt these agreements or practices resulting therefrom from any provision of sections 16 or 17 of the Shipping Act, 1916; and

IT IS FURTHER ORDERED, That the Pacific Maritime Association and the International Long-shoremen's and Warehousemen's Union, and their respective members are hereby made respondents in this proceeding; and

IT IS FURTHER ORDERED, That a public hearing be held before an Administrative Law Judge of the Commission's Office of Administrative Law Judges at a date and place to be determined and announced by the Administrative Law Judge; and

IT IS FURTHER ORDERED, That notice of this order be published in the Federal Register and that a copy thereof and notice of hearing be served upon Petitioners and both the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their respective members; and

IT IS FURTHER ORDERED, That notice of this order and notice of hearing be mailed directly to the Department of Justice, the Department of Labor and the National Labor Relations Board; and

IT IS FURTHER ORDERED, That all future notices issued by or on behalf of the Commission in this proceeding, including notice of time and place of hearing or prehearing conference, shall be mailed to Petitioners, the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their members,

and any other person made a party of record to this proceeding; and

IT IS FURTHER ORDERED, That any person other than those named herein who desires to become a party to this proceeding and to participate herein, shall file a petition to intervene in accordance with Rule 5(1) (46 CFR § 502.72) of the Commission's Rules of Practice and Procedure.

FINALLY, IT IS ORDERED, That Seattle's Petition for Severance hereby is denied.

By the Commission.

/s/ Francis C. Hurney
FRANCIS C. HURNEY
Secretary

[SEAL]

#### APPENDIX D

Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814:

Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc., by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption.

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be subject to a civil penalty of not more than \$1,000 for each day such violation continues: Provided, however, That the

penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

39 Stat. 734, as amended, 46 U.S.C. 815:

Discriminatory acts prohibited.

It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means. Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

Whoever violates any provision of this section other than paragraphs First and Third hereof shall be subject to a civil penalty of not more than \$5,000 for each such violation.

Whoever violates paragraphs First and Third hereof shall be guilty of a misdemeanor punishable by a fine of not more than \$5,000 for each offense.

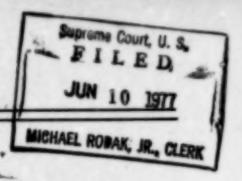
39 Stat. 734, as amended, 46 U.S.C. 816:

Discriminatory rates prohibited; supervision by Board.

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

APPENDIX



## Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners

\_v\_

PACIFIC MARITIME ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 5, 1977 CERTIORARI GRANTED FEBRUARY 28, 1977

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

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#### Docket No. 72-48-Federal Maritime Commission

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

#### RELEVANT DOCKET ENTRIES

- 9-6-72—Served Order of Investigation to appear in Federal Register. Motion of ILWU to dismiss petition for investigation is denied.
- 9-12-72—Appeared F.R. Page 18494, Vol. 37, No. 177.
- 9-11-72— Served notice assigning proceeding to Administrative Law Judge Bryant for hearing and initial decision.
- 9-18-72—Received notice of appearance of Edward D. Ransom and Robert Fremlin, Lillick, McHose, Wheat Adams & Charles as attorneys for Pac. Maritime Ass'n.
- 9-21-72—Received Petition of Pacific Maritime Association to Amend Order of Investigation.
- 10-3-72—Received Reply of H.C. to Petition of PMA to Amend Order of Investigation.
- 10-6-72—Received Petition of Council of North Atlantic Shipping Associations.
- 10-13-72—Received Response of Pacific Maritime Association to Hearing Counsel's Reply to Petition.
- 10-16-72—Received Reply by Port of Seattle to H.C.'s Petition for Severance of Jurisdictional Issues.
- 10-17-72—Received Joinder in Petition and Response of International Longshoremen's and Warehousemen's Union with Pacific Maritime Association for an amendment of the Commission's Order of Investigation and joins in the response of the Pacific Maritime Association to H.C.'s Reply to said Petition.

#### DATE FILINGS—PROCEEDINGS

- 10-19-72—Served First Supplemental Order Severing Jurisdictional Issues to appear in F.R. —Appeared F.R. Thurs., Oct. 26, 1972—pg. 22903-22904, Vol. 37, No. 207.
- 10-25-72—Petition to Intervene granted by Administrative Law Judge to Council of North Atlantic Shipping Associations.
- 11-1-72—Served Notice of Permission to Intervene (Port of Seattle)
- 11-13-72—Received Petition of International Longshoremen's Ass'n, AFL-CIO, to Intervene.
- 12-5-72—Served notice granting permission to intervene to ILA.
- 12-15-72—Received Memorandum of Port of Seattle on Sec. 15 Jurisdictional Issues (Aff. of Richard D. Ford; Petition for Severance and Stay); Affidavits of Fact and Memorandum of Law of Attorneys for Petitioner Ports; Memorandum and Affidavits of Pac. Maritime Ass'n.
- 12-18-72—Received Memorandum of Law of Intervenor Council of North Atlantic Shipping Ass'n; Joinder by International Longshoremen's and Warehousemen's Union in the Memorandum submitted by PMA; Memorandum of Law of H.C.; (12-15) Correction to PMA's Legal Memorandum.
- 12-19-72—Received Memo. of Law on behalf of International Longshoremen's Ass'n, AFL-CIO.
- 1-12-73—Received Reply Memorandum of Pacific Maritime Association on Jurisdictional Issues and Affidavit of B.H. Goodenough.
- 1-12-73-Received Reply of H.C. to Memorandum of Law.
- 1-12-73—Received Reply Memorandum of Port of Seattle.
- 1-15-73—Received Reply Memorandum of North Atlantic Shipping Associations.

- 1-22-73—Received Memorandum of Law in Rebuttal on Behalf of Petitioner Ports.
- 1-30-74—Served Second Supplemental Order Consolidating Jurisdictional Issues to appear in F.R.
- 2-4-74—Appeared F.R. Page 4506, Vol. 39, No. 24.
- 2-25-74—Served notice granting permission to Wolfsburger Transport-Gesellschaft m.b.H. for leave to intervene.
- 3-4-74—Served notice reassigning proceeding to Administrative Law Judge Seymour Glanzer.
- 3-4-74—Received Response of Port of Seattle to Second Supplemental Order Consolidating Jurisdictional Issues.
- 3-6-74—Received Memorandum of Law of Petitioner Ports in Response to Second Supplemental Order Consolidating Jurisdictional Issues.
- 3-18-74—Received Response of H.C. to Second Supplemental Order Consolidating Jurisdictional Issues.
- 4-1-74—Received Reply Memorandum of Port of Seattle in Response to Second Supplemental Order Consolidating Jurisdictional Issues.
- 4-2-74—Received Reply Memorandum of Law of Pacific Maritime Ass'n in Response to Second Supplemental Order Consolidating Jurisdictional Issues.
- 4-3-74—Received Response and Supporting Affidavit to Memorandum of Law of PMA and Affidavit of Edmund J. Flynn.
- 4-5-74—Sent memo. to Commission re responses to first and second supplemental orders; Commission has considered responses to the first supplemental orders.
- 4-12-74—Received Motion of Council of North Atlantic Shipping Ass'ns for Leave to File a Memorandum of Law to the Reply of Petitioner Ports filed Apr. 1, 1974.

#### DATE FILINGS—PROCEEDINGS

1-30-75—Served Report of the Commission. Commission orders that PMA and the International Longshoremen's and Warehousemen's Union and their respective members are made respondents; public hearing to be held before an Administrative Law Judge at a date and place to be determined and announced by presiding judge—Order to appear in Federal Register.

- 2-14-75—Appeared Page 6823, Vol. 40, No. 32.
- 2-19-75—Received Petition of PMA to Hold Further Hearing in Abeyance.
- 3-4-75—Served Judge Glanzer's notice of proceeding held in abeyance pending Judicial Review.

#### GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 75-1140

PETITION FOR REVIEW OF ORDER OF THE FEDERAL MARITIME COMMISSION

PACIFIC MARITIME ASSOCIATION, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

COUNCIL OF NORTH ATLANTIC SHIPPING ASSO.
PORTS OF ANACORTES, ET AL., INTERVENOR

#### RELEVANT DOCKET ENTRIES

- (L)2-18-75 4-Petitioner's petition for review of an order of the FMC (m-13) 4-2
- (R) 3-28-75 Clerk's order granting the motion of the Council of North Atlantic Shipping Asso. for leave to intervene; counsel for the intervenor may participate in oral argument only to the extent allowable under Rule 12 of the General Rules of this Court
- (R) 4-2-75 Clerk's order granting petitioner's motion to consolidate and nos. 75-1140 and 75-1215 are hereby consolidated for consideration on the merits.
- (R) 4-8-75 Clerk's order granting motion of the Ports of Anacortes, et al for leave to intervene; counsel for the intervenor may participate in oral argument only to the extent allowable under Rule 12 of the General Rules of this Court

#### DATE FILINGS—PROCEEDINGS

- (R) 5-7-75 Order per CJ Bazelon granting respondents' motion for leave to have record in no. 75-1140 treated as the record in no. 75-1215 and the Clerk shall indicate on the docket in no. 75-1215 that the record on file in no. 75-1140 is deemed as filed therein
- (G) 6-20-75 15-Petitioner's brief (m-19)
- (G) 6-20-75 15-Joint Appendix (m-20)
- (G) 6-26-75 25-Intervenor's (Council of North Atlantic Shipping Associations) brief (Corrected) (m-24) (OK-DMC)
- (G) 8-14-75 15-Intervenor's (Ports of Anacortes, et al.) brief (m-13)
- (C) 9-17-75 15-Respondents' brief (m-15)
- (R)2-11-76 Per Curiam order sua sponte, that the parties address this issue by supplemental memoranda to be filed simultaneously not later than February 25, 1976; Wright, McGowan and Tamm, CJ
- (C) 2-24-76 15-Petitioner's supplemental memorandum (m-23)
- (H) 2-25-76 4-Respondents' supplemental memorandum (m-23)
- (C) 2-25-76 25-Intervenor's (Council of North Atlantic Shipping Asso.) supplemental memo indum (m-20)
- (K) 2-27-76 Argued before Wright, McGowan and Tamm, CJ; The Court directed counsel for the parties to file supplemental memoranda with the Clerk on or before March 10, 1976
- (G)3-8-76 4-Respondents' supplemental memorandum (m-5)
- (G) 3-9-76 15-Petitioner's supplemental memorandum (m-5)
- 8-27-76 Opinion for the Court filed by Circuit Judge Tamm.
- 8-27-76 Judgment remanding case to the Federal Maritime Commission for further proceedings. (n)
- 9-21-76 Certified copy of opinion and judgment issued to the FMC.

#### GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

75-1215

PETITION FOR REVIEW OF ORDER OF THE FEDERAL MARITIME COMMISSION

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

- (B) 2-28-75 4-Petition for review of an order of the Federal Maritime Commission (m-25) 4-14
- (R)4-2-75 Clerk's order granting the petitioner's in no. 75-1140 motion to consolidate and nos. 75-1140 and 75-1215 are hereby consolidated for consideration on the merits
- (R)5-7-75 Order per CJ Bazelon granting respondents' motion for leave to have record in no. 75-1140 treated as the record in no. 75-1215; and the Clerk shall indicate on the docket in no. 75-1215 that the record on file in no. 75-1140 is deemed as filed therein
- (G) 6-20-75 15-Joint Appendix (m-19)
- (K) 6-24-75 15-Petitioner's Brief (m-19)
- (C)9-17-75 15-Respondents' brief (m-15)
- (K) 11-3-75 15-Petitioner's Reply Brief (m-30)
- (R)2-11-75 Per Curiam order sua sponte, that the parties address this issue by supplemental memoranda to be filed simultaneously not later than February 25, 1976; Wright, McGowan and Tamm, CJ

# C) 2-24-76 25-Petitioner's supplemental memorandum (m-20) (G) 2-25-76 4-Respondents' supplemental memorandum (m-23) (K) 2-27-76 Argued before Wright, McGowan and Tamm, CJ; The Court directed counsel for the parties to file supplemental memoranda with the Clerk on or before March 10, 1976 (G) 3-8-76 4-Respondents' supplemental memorandum (m-5) (G) 3-8-76 25-Petitioner's supplemental memorandum (m-5) 8-27-76 Opinion for the Court filed by Circuit Judge Tamm.

8-27-76 Judgment remanding case to the Federal Maritime

Commission for further proceedings. (n)

#### FEDERAL MARITIME COMMISSION

[Served September 6, 1972— Federal Maritime Commission]

#### Docket No. 72-48

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

#### ORDER OF INVESTIGATION

The Ports of Anacortes, Bellingham, Everett, Grays Harbor, Olympia Port Angeles, Portland and Tacoma (hereinafter collectively referred to as Petitioners) have filed with this Commission a petition requesting an investigation of agreements, providing for the employment of longshore labor, entered into by the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union (ILWU), and the practices resulting from the implementation thereof. Both PMA and the ILWU have filed replies urging denial of Petitioners' request.

Petitioners, are municipal corporations owning and operating marine terminal facilities in the States of Washington or Oregon. None of the Petitioners is a member of PMA.

PMA is a corporation organized and existing under the laws of the State of California whose membership includes steamship lines, steamship agents, stevedoring companies and marine terminal companies operating at Pacific Coast ports of the United States.

ILWU is an unincorporated association and is the bargaining agent representing longshoremen, marine

checkers and dock workers with related skills, who are employed by the members of PMA at Pacific Coast ports

of the United States.

Specifically, the agreement which Petitioners would have the Commission investigate is a so-called Supplemental Memorandum of Understanding No. 4, dated April 25, 1972, which allegedly supplements a master collective bargaining agreement establishing the "hiring halls" which must be utilized by Petitioners to obtain longshore labor. As regards the Supplemental Memorandum, Petitioners explain that:

Said Memorandum provides, inter alia, that a nonmember of PMA must become a party to said agreement for an indefinite duration as a condition to directly employing any member of the joint work force, and that any nonmembers' "separate ILWU contract" must conform to said Memorandum. Any nonmember who fails to conform to the manpower allocation and the referral system of the PMA and ILWU is disqualified from employing any member of the joint work force. Said Memorandum subjects nonmembers to payment of assessments and dues and acceptance of proportional liability as to obligations of the PMA and its member companies, and compels such nonmembers to submit to the labor policies of the PMA as respects strikes and lockouts.

Petitioners submit that the aforementioned Supplemental Memorandum as well as the underlying master collective bargaining contract are "agreements" within the meaning of section 15 of the Shipping Act, 1916, which should be filed for Commission approval pursuant to that section.

Further, Petitioners maintain that the Supplemental Memorandum and the practices contemplated thereby are detrimental to the commerce of the United States, contrary to the public interest, unfair, unjust, discriminatory and unduly prejudicial and violative of sections 15, 16 and 17 of the Shipping Act, 1916 in that they:

(1) Would permit the PMA and the ILWU to monopolize, dominate and control the business of moving cargo in foreign and interstate commerce from and to the Petitioners' ports, including the handling and storage of such cargo while at such ports.

(2) Would force shippers and consignees to deal with nonmembers of the PMA, including the Petitioners' ports, on terms substantially less advantageous than with members of the PMA, thereby enforcing a concerted boycott by shippers and consignees of such nonmembers. The effect of such boycott would be to make it difficult or impossible for nonmembers, including Petitioners' ports, to remain in business.

(3) Would force Petitioners and others similarly situated to join the PMA in order that the latter could control their activities, including dictating the

labor policies of the Petitioners.

(4) Would regulate, dominate and restrain interstate and foreign commerce with respect to moving and storing cargo to be operated and carried out under artificial and noncompetitive conditions.

(5) Would achieve for the PMA an exclusive, preferential and cooperative working arrangement.

(6) Would permit the PMA and the ILWU to control and regulate the marine terminal operations of Petitioners and prevent and destroy competition of the Petitioners with member companies of the PMA.

PMA's response to the petition for investigation denies all but a few unessential allegations contained therein. On the strength of the fact that the ILWU, one of the two contracting parties to the agreements at issue, is not an "other person" within the meaning of section 1 of the Shipping Act, 1916, PMA maintains that "for said reason alone, notwithstanding all other reasons, neither, the [master] agreement nor Supplemental Memorandum . . . is an agreement covered by the Shipping Act nor is either subject to submission, review and/or approval by the . . . Commission pursuant to said Act." Likewise, the ILWU has moved to dismiss the petition for investigation on the grounds that it is not subject to the Commission's jurisdiction and accordingly, the Commission has no authority over the agreements be-

tween it and PMA.

The Commission has considered this petition by these various Northwest ports requesting an investigation of the said collective bargaining contract, and supplemental agreement thereto, and replies filed by PMA and the ILWU, and it is of the opinion that to the extent such "contracts" involve underlying agreements among and between the members of PMA they are within the Commission's jurisdiction and should be made subject to a formal investigation.

THEREFORE IT IS ORDERED, That pursuant to section 22 of the Shipping Act, 1916, (46 U.S.C. 821) an investigation be instituted to determine:

1. Whether the master collective bargaining contract and the Supplemental Memorandum of Understanding No. 4 entered into by PMA and the ILWU embody any agreements between and among the members of PMA, which agreements are subject to the requirements of Section 15 of the Shipping Act, 1916 (46 U.S.C. 814) and should be filed for approval under that section, or whether such agreements otherwise exist;

2. Whether the implementation by PMA and the ILWU of the master collective bargaining contract and Supplemental Memorandum of Understanding No. 4 will result in any practices which will subject any person, locality or description of traffic to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act, 1916 (46

U.S.C. 815); 3. Whether the implementation by PMA and the ILWU of the master collective bargaining contract and Supplemental Memorandum of Understanding No. 4 will result in any practice which is unjust or unreasonable in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. 816);

4. Whether any labor policy considerations would operate to exempt these agreements or practices resulting therefrom from any provision of section 15, 16 or 17 of the Shipping Act, 1916; and

IT IS FURTHER ORDERED, That the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, and their respective members are hereby made respondents in this proceeding; and

IT IS FURTHER ORDERED, That a public hearing be held before an examiner of the Commission's Office of Hearing Examiners at a date and place to be determined and announced by the Hearing Examiner; and

IT IS FURTHER ORDERED, That notice of this order be published in the Federal Register and that a copy thereof and notice of hearing be served upon Petitioners and both the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their respective members; and

IT IS FURTHER ORDERED, That notice of this order and notice of hearing be mailed directly to the Department of Justice, the Department of Labor and the National Labor Relations Board; and

IT IS FURTHER ORDERED, That all future notices issued by or on behalf of the Commission in this proceeding, including notice of time and place of hearing or prehearing conference, shall be mailed to Petitioners, the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their members, and any other person made a party of record to this proceeding; and

IT IS FURTHER ORDERED, That any person other than those named herein who desires to become a party to this proceeding and to participate herein, shall file a petition to intervene in accordance with Rule 5(1) (46 CFR § 502.72) of the Commission's Rules of Practice and Procedure.

FINALLY, IT IS ORDERED, That the motion of the ILWU to dismiss the petition for investigation is denied.

By the Commission.

/s/ Joseph C. Polking JOSEPH C. POLKING Assistant Secretary

[SEAL]

### BEFORE THE FEDERAL MARITIME COMMISSION

[Received Sept. 21, 1972]

[Caption Omitted]

# PETITION OF PACIFIC MARITIME ASSOCIATION TO AMEND ORDER OF INVESTIGATION

Respondent Pacific Maritime Association (PMA) hereby petitions the Commission for an amendment of its Order of Investigation, dated September 6, 1972, on the following grounds:

Concurrently with the filing of this petition PMA filed with the Commission the ILWU-PMA Nonmember Participation Agreement which is the subject matter of this investigation. The agreement was filed for the purpose of obtaining a ruling that it is not subject to Section 15 of the Shipping Act. PMA has also requested a ruling that if it is determined that the agreement is subject to Section 15, the Commission rule that the agreement is within the labor exemption from the Shipping Act adopted in the Commission's decision of August 25, 1972, in United Stevedoring Corp. v. Boston Shipping Ass'n., Docket No. 70-3, or that if the agreement is not within said labor exemption, it be approved under Section 15. The same request for a ruling or in the alternative approval has been made with respect to any underlying agreements between all or any PMA members embodied in the ILWU-PMA Nonmember Participation Agreement.

The issue of the approvability of the Nonmember Participation Agreement, or underlying agreements between PMA members and to be embodied therein, is not presently a part of this investigation. However, by virtue of the aforementioned filing of the agreement this issue is now before the Commission for determination. In view of the identity of issues in this investigation and in any consideration of approvability, respondent PMA here-

by requests that the investigation in Docket No. 72-48 be broadened by amending the Commission's Order of Investigation to include a determination by the Commission that if the Nonmembers Participation Agreement or any underlying agreements between PMA members embodied therein are subject to Section 15 and are not within the labor exemption from the Shipping Act, that said agreement or agreements be approved pursuant to Section 15.

Dated: September 19, 1972.

Respectfully submitted,

EDWARD D. RANSOM
ROBERT FREMLIN
LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES

By /s/ Edward D. Ransom
EDWARD D. RANSOM
311 California Street
San Francisco, California 94104
Attorneys for Respondent PMA

## BEFORE THE FEDERAL MARITIME COMMISSION

[Received Oct. 3, 1972]

[Caption Omitted]

#### REPLY OF HEARING COUNSEL TO PETITION TO AMEND ORDER AND PETITION TO SEVER JURISDICTIONAL ISSUES

Respondent Pacific Maritime Association (PMA) requests the Commission to amend its order of investigation served September 6, 1972, by including the issue of approvability of the subject agreements assuming such agreements are found to be subject to section 15 and not within the labor exemption from the Shipping Act, 1916. For the reasons stated herein, Hearing Counsel urge the Commission to deny the petition without prejudice and instead adopt the supplemental order attached hereto severing the purely legal issues of jurisdiction for determination.

The Commission's order sets forth the following issues, i.e., whether agreements relating to the Supplemental Memorandum of Understanding No. 4 must be filed for approval under section 15, whether their implementation would violate sections 16 or 17 of the Act, and whether any labor policy considerations operate to exempt these agreements or practices resulting therefrom from any provision of sections 15, 16, or 17. The issues therefore break down into those plating to jurisdiction and those relating to the practical effect of implementation, i.e. the possible unjust or unreasonable consequences of the agreements and the undue or unreasonable prejudice or disadvantage which might flow therefrom.

Petitioner's desire to include the issue of approvability in the proceeding since the sections 16 and 17 issues already included are by their nature related to that of approvability. In the opinion of Hearing Counsel, however, it would be futile and wasteful to develop an evidentiary record which would fully explore the merits of the subject agreements if the Commission were to

find that it lacked jurisdiction on the theory that a labor exemption operates to exempt such agreements from the provisions of the Shipping Act, 1916. Before the parties are put to the expense and burden of proving their contentions on the merits of these argeements, we submit, they ought to be informed by the Commission that they would not be wasting their time. Therefore, we submit, the Commission ought to sever the issues relating to jurisdiction and determine them expeditiously in a separate

proceeding.

We acknowledge that such proceeding is appropriate only where there are no genuine issues of material fact and the issue to be determined is primarily a matter of law. The status of Supplemental Memorandum No. 4, we submit, with regard to section 15 and the labor exemption depends upon facts which should not be in dispute, such as whether the Memorandum is the product of good-faith collective bargaining, relates to a mandatory subject of bargaining, imposes terms on entities outside the collective bargaining group, and whether the union is acting at the behest of or in combination with non-labor groups. United Stevedoring Corporation v. Boston Shipping Association, F.M.C. Docket No. 70-3, August 25, 1972, multilith opinion, p. 8.

The primary concern of the protesting ports, we submit, relates not to the facts concerning the collective-bargaining genesis of the agreements but the practical consequences of the agreements as they affect protestants' businesses. Therefore, in the interests of resolving the critical threshold issues of jurisdiction and application of the labor exemption and of avoiding unnecessary litigation, we urge the Commission to sever the jurisdictional issues from the proceeding for expeditious determination in the same fashion as the Commission has done in a comparable case, i.e., Docket No. 72-51, New York Shipping Association—NYSA-ILA Man-Hour/Tonnage Method of Assessment; Possible Violation of Sections 15, 16, and 17, Shipping Act, 1916.

Should it appear upon filing of affidavits and memoranda that, contrary to our expectation, there do exist issues of fact material to the purely legal question of

jurisdiction, the Commission is of course free to refer resolution of such issues to an Administrative Law Judge. No time will have been wasted under such a procedure, since the parties would in all probability have prepared and submitted the same testimony anyway in an evidentiary hearing. On the other hand, if the Commission does not offer the parties an opportunity to obtain expeditious determination of the critical legal issue, they are compelled to litigate factual issues and bear the expense of proving all their contentions in what probably will be a long, involved evidentiary hearing, all of which could be avoided if the Commission finds as a matter of law that the entire matter falls within the so-called labor exemption from section 15.

An appropriate order serving the legal issue for ex-

peditious determination is attached.

Respectfully submitted,

Donald J. Brunner, Director Bureau of Hearing Counsel

Norman D. Kline Hearing Counsel

Paul J. Kaller Hearing Counsel

## BEFORE THE FEDERAL MARITIME COMMISSION

[Received Oct. 17, 1972]

[Caption Omitted]

## JOINDER IN PETITION AND RESPONSE

Comes now INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and hereby joins in the Petition of Respondent PACIFIC MARITIME ASSOCIATION for an amendment of the Commission's Order of Investigation and joins in the Response of the Pacific Maritime Association to the Hearing Counsel's Reply to said Petition.

DATED: October 12, 1972.

Respectfully submitted,

GLADSTEIN, LEONARD, PATSEY AND ANDERSEN

By /s/ Norman Leonard
Norman Leonard
Attorneys for INTERNATIONAL
LONGSHOREMEN'S AND
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#### FEDERAL MARITIME COMMISSION

[Served October 19, 1972— Federal Maritime Commission]

[Caption Omitted]

# FIRST SUPPLEMENTAL ORDER SEVERING JURISDICTIONAL ISSUES

This proceeding was instituted by Order of Investigation served September 6, 1972, to determine whether a master collective bargaining contract and a Supplemental Memorandum of Understanding No. 4 (Contracts) entered into by the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union (ILWU) embody any agreements between and among the members of PMA, which agreements are subject to the requirements of section 15 of the Shipping Act, 1916; whether the implementation of these Contracts by PMA and the ILWU will result in any practices which are violative of sections 16 and 17 of that Act and, finally; whether there are any labor policy considerations which would operate to exempt such agreements or practices from any provision of the aforementioned sections of the Shipping Act, 1916.

The Commission's investigation was initiated at the request of several Northwest ports who maintain that the Contracts, providing for the employment of longshore labor, are "agreements" within the meaning of section 15 of the Act which should have been filed for Commission approval pursuant to that section.

PMA has now submitted the PMA-ILWU Supplemental Memorandum of Understanding No. 4 for a de-

<sup>\*</sup> The Ports of Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, Portland and Tacoma.

termination of its subjectivity to section 15 and, should it be found subject to that section, for its approval. By virtue of the aforementioned filing of the agreement and in view of "the identity of issues in this investigation and in any consideration of approvability", PMA has concurrently filed therewith a Petition requesting that the Commission amend its Order of Investigation in this proceeding to include as an issue for determination the approvability of the PMA-ILWU Supplemental Memorandum and any underlying agreements embodied therein.

In reply to this Petition, Hearing Counsel have suggested that the question of Commission jurisdiction over the subject agreements be severed from this investigative proceeding for an expeditious determination. This Petition is well taken. The issues relating to possible prejudicial, discriminatory, or detrimental effects resulting from implementation of the subject agreements by their nature require resolution on the basis of a fully developed evidentiary record. However, the purely legal question regarding jurisdiction of the Commission over such agreements pursuant to section 15 may not involve genuine issues of material fact and, consequently, may be determinable on the basis of affidavits of fact and memoranda of law. Should it appear from the affidavits and memoranda that genuine issues of material fact do exist, these can be resolved by an Administrative Law Judge together with the other factual issues set forth in the Commission's Order of September 6, 1972. However, an expeditious decision on the purely legal issue of jurisdiction might result in avoidance of needless litigation. Accordingly, the Commission desires to afford the parties the opportunity of obtaining expeditious determination of the critical threshold issue. In addition, the Commission wishes to consider the question of the subjectivity of the master collective bargaining contract itself, as well as the Supplemental Memorandum and the underlying agreements embodied in both.

THEREFORE, IT IS ORDERED, That the first ordering paragraph of the Commission's Order of September 6, 1972, be amended as follows:

- 1. Whether the master collective bargaining contract and the Supplemental Memorandum of Understanding No. 4 entered into by PMA and the ILWU embody any agreements between and among the members of PMA, which agreements are subject to the requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814) and should be filed for approval under that section, or whether such agreements otherwise exist; and whether the master collective bargaining contract and the Supplemental Memorandum of Understanding No. 4 are themselves agreements subject to the requirements of section 15 and should be filed for approval;
- 4. Whether any labor policy considerations would operate to exempt these agreements from the provision of section 15 of the Shipping Act, 1916;
- 5. Whether any labor policy considerations would operate to exempt the practices resulting from these agreements from the provisions of sections 16 and 17 of the Shipping Act, 1916;
- 6. Whether the master collective bargaining contract and Supplemental Memorandum of Understanding No. 4 entered into by PMA and the ILWU and any agreements between and among the members of PMA embodied therein should, if found subject to the requirements of section 15 of the Shipping Act, 1916, and found not within any labor exemptions, be approved, disapproved, or modified pursuant to that section; and

IT IS FURTHER ORDERED, That pursuant to section 22 of the Shipping Act, 1916, 46 U.S.C. 821, the first and fourth issues set forth in the first ordering paragraph of the amended Order of September 6, 1972, relating to application of section 15 to the subject agreements and operation of labor policy exemptions, be severed from the proceeding for expeditious determination by the Commission; and

IT IS FURTHER ORDERED, That there appearing to be no material issues of fact in dispute with regard to the purely jurisdictional issues arising under section 15, this phase of the proceeding shall be limited to the submission of affidavits and memoranda of law, replies, and oral argument. Should any party feel that an evidentiary hearing be required, that party must accompany any request for such hearing with a statement setting forth in detail the facts to be proven, their relevance to the issues in this phase of the proceeding, and why such proof cannot be submitted through affidavit. Requests for hearing shall be filed on or before November 3, 1972. Simultaneous affidavits of fact and memoranda of law shall be filed by all parties no later than the close of business November 3, 1972. Reply affidavits and memoranda shall be filed by all parties no later than the close of business November 13, 1972. An original and 15 copies of affidavits of fact, memoranda, and replies are required to be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Copies of any papers filed with the Secretary should also be served upon all parties hereto. Time and date of oral argument if requested and/or deemed necessary by the Commission will be announced at a later date; and

IT IS FURTHER ORDERED, That notice of this order be published in the Federal Register and that a copy thereof and notice of hearing be served upon Petitioners and both the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their respective members; and

IT IS FURTHER ORDERED, That notice of this order and notice of hearing be mailed directly to the Department of Justice, the Department of Labor and the National Labor Relations Board; and

IT IS FURTHER ORDERED, That all future notices issued by or on behalf of the Commission with regard to this phase of the proceeding shall be mailed to Petitioners, the Pacific Maritime Association and the Inter-

national Longshoremen's and Warehousemen's Union, individually, and on behalf of their members, and any other person made a party of record to this proceeding; and

IT IS FURTHER ORDERED, That any person other than those who are parties to Docket No. 72-48 who desires to become a party to this proceeding and participate herein, shall file a petition to intervene in accordance with Rule 5(1), 46 CFR 502.72, of the Commission's Rules of Practice and Procedure; and

IT IS FURTHER ORDERED, That the proceedings before the Presiding Administrative Law Judge be stayed pending determination of the severed issues by the Commission.

By the Commission.

/s/ Francis C. Hurney FRANCIS C. HURNEY Secretary

[SEAL]

## BEFORE THE FEDERAL MARITIME COMMISSION

[Received Nov. 13, 1972]

[Caption Omitted]

#### PETITION OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, TO INTERVENE

Your Petitioner, INTERNATIONAL LONGSHORE-MEN'S ASSOCIATION, AFL-CIO, (ILA) respectfully represents that it has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I. That Petitioner is an unincorporated association (labor organization) with its principal place of business at 17 Battery Place, Borough of Manhattan, City and State of New York.

II. Petitioner and its affiliated Locals are parties to collective bargaining agreements with Employer-Associations and Employers in the steamship and stevedoring business covering ports from Searsport, Maine, to Brownsville, Texas, Puerto Rico, the Great Lakes and Canada.

III. The collective bargaining agreements, as aforesaid, cover the terms and conditions of employment of Petitioner's members who are engaged in longshore work in the various ports covered by said agreements, including wages, hours, contributions to various benefit and pension plans, working conditions, holidays, vacations, guaranteed annual income, containerization and LASH (lighter-aboard-ship operations).

IV. The collective bargaining agreements in effect between Petitioner and the various Employer-Associations and Employers are in many respects analogous to the collective bargaining agreement in effect between the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union (ILWU). The petition, which seeks an investigation pursuant to Section 22 of the Shipping Act of a collective bargaining agreement between labor and management, effects the interests of Petitioner. It is the position of Petitioner that the collective bargaining agreement involved in the petition of Ports of Anacortes, etal, and the collective bargaining agreements to which your Petitioner herein is a party, are neither subject to the Shipping Act of 1916 nor to the jurisdiction of this Commission.

V. Your Petitioner and the New York Shipping Association, Inc. (NYSA), an association of Employers with whom Petitioner has a collective bargaining agreement have filed a joint petition for a declaratory order that the collectively bargained assessment agreement between ILA and NYSA is not subject to the Shipping Act.

VI. Because of the similarity in the agreements between PMA and ILWU (the subject of this proceeding) and the various ILA collective bargaining agreements, any determination in this proceeding may have an adverse effect on the collective bargaining agreements to which the Petitioner is a party.

WHEREFORE, Petitioner, having a substantial interest in the matters before the Commission, respectfully requests leave to intervene and be treated as a party herein at all stages of the proceeding.

Dated: New York, N.Y. November 2, 1972

Respectfully submitted,

GLEASON & MILLER

/s/ Thomas W. Gleason
THOMAS W. GLEASON
A member of the firm
Attorneys for Petitioner,
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## BEFORE THE FEDERAL MARITIME COMMISSION

[Received Dec. 15, 1972]

[Caption Omitted]

AFFIDAVIT OF FACTS RELATIVE TO SEGREGATED ISSUE OF JURISDICTION

STATE OF OREGON )
SS
COUNTY OF MULTNOMAH )

I, ALEX L. PARKS, being first duly sworn upon oath depose and say: I am one of the attorneys for the petitioner ports in the above entitled proceeding and make

this affidavit on behalf of said ports.

As a part of my duties as one of the attorneys for the petitioner ports, I have carefully reviewed the entire notes kept by one or more of the members of the negotiating committees for the ILWU and the PMA during the negotiations between those two organizations for the period November 16, 1970 to and including February 8, 1972 during which time the said parties discussed various aspects of Supplemental Memorandum of Understanding No. 4.

The information contained in said notes is relevant to the issues in this proceeding and bears on the questions of (1) whether or not the subject of the Supplemental Memorandum was a mandatory bargaining item and has any intimate relationship with wages, hours and working conditions, and (2) whether the Supplemental Memorandum was the subject of good faith bargaining or, to the contrary, was entered into at the behest of one party to the negotiations upon another party to the negotiations.

Said notes are preceded by the following explanation: "No stenographic notes are kept on ILWU negotia-

"No stenographic notes are kept on ILWU negotiations. The following is dictated from longhand notes taken during the meeting. While the statements contain direct quotations, essentially they are paraphrased accounts of what was said by the individuals indicated."

The substance of said notes, as they relate to the foregoing issues, are summarized as follows:

November 16, 1970 Session-First Meeting

Article XVI of the ILWU Contract Demands, attached to the notes of said meeting, provided as follows:

"The contract to provide that PMA will accept all fringe benefit contributions from any employer, whether or not such employer is a member of the PMA."

December 7, 1970 Session-Second Meeting

At the meeting, the PMA delivered a letter, dated December 7, 1970 to Mr. Bridges and his Committee. Paragraph XVI of that letter contained the following demand:

"The Employers propose that all applicable Sections of the Agreement be amended to eliminate nonmember participation under any provisions of the Agreement unless they are not permitted by law to become members of the Association. Further, the Employers Agreement be amended as of July 1, 1971 to exclude nonmember participation."

With respect to such demand, the following colloquy occurred at the meeting:

Bridges: We intend to do this. Explain what you mean on item XVI.

Goodenough: So far as the Employers are concerned, we want all those who participate to be PMA members. Otherwise, we don't want any participating in the benefits.

December 9, 1970 Session—Third Meeting
During the meeting, the following colloquy occurred:

Goodenough: (Reading from list) Travel time and transportation has always been negotiated locally. On port authorities who are not PMA members, what is your intent?

Bridges: The local would make the agreement. We can do this now. You have nothing to say about

it.

Goodenough: Have you taken into consideration

our position.

Bridges: Yes. Any agreements negotiated would be the same. They would be covered by the basic agreement. They would be no better, no worse. They would participate in all the benefits.

December 10, 1970 Session-Fourth Meeting

During the meeting the following colloquy occurred:

Bridges: Are you saying that local rules should not conflict with the Coast Agreement?

Goodenough: Yes.

Goodenough: On item 5, travel time and transportation, there is no need to change the present policy. These matters have always been handled at the local level. On item 6, Port Authority Agreements, we technically have no control over what the Union negotiates with someone who is not a PMA member. However, the Union doesn't have the right to negotiate something which binds PMA.

Bridges: I understand what you are saying. We don't propose to commit you without your approval. We haven't figured out how to bind you as yet, but we will

Goodenough: How are you going to do it? Bridges: There are many ways.

February 3, 1971 Session—Sixth Meeting

During the meeting the following colloquy occurred:

Goodenough: When you are talking public docks and work jurisdiction are you talking about section 1 of the Agreement?

Bridges: Yes, with some enlargements.

Ward: Another example is where a third party sets up a business and no longshoremen are used

and no PMA employers are involved.

Goodenough: There are bona fide industrial docks. These are not in question. We then have the aluminum operation where no PMA member is involved. Where do we fit in that picture?

Bridges: The ship will be barred from other cargo operations. It will have to deadhead out.

Goodenough: Then PMA member companies can-

not use the vessel?

Bridges: No! We know what you are leading to. The hell with the courts and the NLRB actions.

February 4, 1971 Session-Seventh Meeting

During the meeting the following colloquy occurred:

Bridges: On Page 18, on the fringe benefits, what do you mean by "unless such nonmember is prohibited by law . . .?"

Goodenough: For example, there are laws governing port authorities which prohibit them from

joining PMA. There is also the military.

Bridges: Explain what you mean by amending agreements to exclude nonmember participation.

Goodenough: We have supplemental plans today that allow use of ILWU labor and payments into various funds. It is our position that if they don't belong to the "Employers' Union" then they cannot participate in any of the benefit plans and this will apply to all non-PMA members.

At the meeting, the PMA representatives presented a further draft of proposals, entitled PMA Draft No. 4-A. Article XVI, entitled Fringe Benefit Contributions, repeated the proposal or demand set forth above with respect to the December 7, 1970 Session.

February 18, 1971 Session-Eleventh Meeting At the meeting, the following colloquy occurred:

Bridges: We will put the freight forwarders and consolidators out of business. We will double handle the cargo and you pay the bill. We will force the others into line.

Goodenough: It is fine to say these things, but let's figure out what we are going to do toward

working out an agreement.

Bridges: You keep pointing to competition from non-PMA members. These operations are going to be shut down and this will include Sea-Land. We are going to put the nonmembers out of business.

Goodenough: We have a list of things the East Coast has as, for instance, no skill differentials, steady men, and lots of other "goodies".

Bridges: Make us an offer and include all these items. We plan to handle the non-PMA companies after we have a PMA agreement. Switch it around if you wish, and we will handle non-PMA companies first.

March 12, 1971 Session-19th Meeting

During the meeting, the following colloquy occurred:

Bridges: Here's what we have in mind. We realize there are many complications. We are talking about longshore work beyond Section 1 as described. You are saying the cargo is delivered and PMA has no control. There are variations which include involvements with Port properties. These should be handled at the local level.

Goodenough: You are saying to us that, when the stevedore is finished and somebody else takes control, then it should become a local matter and you would deal with the party doing work outside of the agreement without it hurting PMA operations. What if the local party is a non-PMA member?

Bridges: It could be a PMA member or non-PMA member. We simply get rid of the problem here and deal with it locally.

Goodenough: You can only be talking about a

non-PMA member.

Bridges: If it is a PMA member doing the work we are talking about we would negotiate with him.

Goodenough: If a PMA member releases control,

then your problem is with the non-PMA member.

Ward: The key to this is the idea that you release control of the cargo while it is on your premises, and then others do the work we are talking about. In a sense, you subcontract.

Goodenough: We don't subcontract.

Bridges: We want to correct this by changing the language so as to avoid subcontracting. Port authorities are involved. We want to get it down to a local level and handle it there. We are only dealing with the terminal operation.

There then followed a discussion which is not reported.

March 26, 1971 Session-Twenty-Third Meeting

During the meeting, the following colloquy occurred with respect to the proposal of PMA that the problem of jurisdiction be handled by way of a guaranteed annual wage:

Goodenough: We think our proposal is the only way to handle the issue. There is little significance in the number of forwarders and consolidators containers.

Bridges: We are concerned with your statement about breaking up your Union. Explain what you mean. They would all be treated the same—members and nonmembers. Maybe we would charge the nonmembers more. Give me an answer on what you mean by fragmenting your members—this concerns me.

March 30, 1971 Session-Twenty-Fifth Meeting

During the meeting the following colloquy occurred:

Bridges: You want the option and a CFS document.

Goodenough: Our proposal only refers to the Teamster jurisdiction on the dock and likewise the forwarders and consolidators.

Bridges: Why can't we settle that problem on the containers?

Goodenough: There is no way for us to put container stuffers out of business. The consolidators and forwarders are not PMA members.

Bridges: Then there is no hope of an agreement between us.

March 31, 1970 Session-Twenty-Sixth Meeting

During the meeting the following colloquy occurred with respect to container freight stuffing:

Ward: The Fact Finding Team has experience along these lines. Take Matson and PMT, for instance. Are you saying, what do we do with them?

Bridges: Cancel them.

Goodenough: What is the implication?

Bridges: The Teamsters get mad. They follow the work. They won't handle any cargo.

Goodenough: Then what? What assurance can you give us.

Bridges: None. In my judgment, they won't shut down the container operations. You have the weapons if they do.

Goodenough: It is the steamship company that controls the containers and he is a nonmember.

Bridges: Under 1.534 the employers agreed that cargo not in shippers' loads would be handled by the ILWU. We gave you six months to cooper this up.

Goodenough: Try Paragraph 1.5(2) under the transition. The nonmember company has a legal right.

Bridges: The best you have on this is up to June 30. The document disappears. Section 1.534 covers.

Goodenough: Why doesn't 1.5(2) cover it? The nonmember company delivers cargo to himself and has a legal right to do this. This is what Sea-Land and U.S. Lines do.

Bridges: The answer is just the same. The way you spell it out is illegal. You will find out on June

Goodenough: Our stevedores would like to stop those containers, but they can't.

Bridges: I agree they want the work, but they can tell those people they can't handle those contain-

Goodenough: What about port authorities who employ longshoremen? What about Local 9 vs. Local 19, for instance. Will this continue?

Bridges: No.

Goodenough: If company off dock employs ILWU help-say a consolidator employs Local 13 or Local 10-will these containers go?

Bridges: Yes.

Goodenough: Assume Local 6 and Local 9 signs agreements with nonmembers. Will these containers go?

Bridges: We will straighten that situation out ourselves with our locals. The same goes with the port authorities. We won't bother you with this. You are talking about the Port of Seattle. We are going to give our local the same treatment as the Teamsters.

Goodenough: If I can get these zone descriptions from each area, can we discuss on this basis?

Bridges: If port commissions are within the zone area, are they included?

Goodenough: If within the zone area, then I assume yes.

Bridges: All port operations will be included.

Goodenough: If they are a member company, then they will be covered. If it is a nonmember and they have an agreement with you, then you play "footsies".

Bridges: We are not talking about the Port of

Seattle, not Peoria or Chicago.[1]

Goodenough: Then we can talk constructively regarding the zone concept?

Bridges: Yes.

Goodenough: Then I understand, (1) in port operations where the problem is between two ILWU segments, you will handle and (2) where member companies have agreements and they are terminated they will move to the ILWU and there is no relief on the IBT; on nonmembers with CFS operations, they must come under the terms of our CFS agreement and, in the instance of nonmember steamship companies, they are to be told by the PMA stevedore that their containers cannot be handled.

Bridges: I assume you are talking about problems on the ninety days' cancellation. We don't want

you to do anything illegal.

Ward: We told you earlier that what we would do with nonmember steamship companies. We won't work them.

## April 8, 1971 Session-Thirtieth Meeting

At the meeting, the PMA submitted a revised proposal dated the same date. Article XVI relating to fringe benefit contributions contained the same language as earlier proposals; i.e., eliminating nonmember participation under any provisions of the agreement unless such nonmember is prohibited by law from becoming a member of PMA. Also, amending all supplemental agreements

<sup>(1)</sup> As it appears in the minutes. The third word in the first line-"not"-should probably be "now".

to the Coast Agreement to exclude nonmember participation on and after the effective date of the new agreement.

In the colloquy which occurred relating to the fringe

benefits, the following was stated:

Loveridge: On the fringe benefits, what is the reason?

Goodenough: We don't want non-PMA members sharing in the "goodies".

June 3, 1971 Session-Thirty-Fourth Meeting

In the meeting, the following colloquy occurred:

Goodenough: Let's say we made a mistake and we start to work out a CFS agreement that will work. What about the consolidators and forwarders? Bridges: Put them out of business. We'll help you.

June 7, 1971 Session-Thirty-Sixth Meeting

During the meeting, the following colloquy occurred:

Goodenough: On paid holidays, our position is there shall be four paid holidays effective in 1973. On the fringe benefit contributions, our position remains the same on nonmember participation.

Bridges: What does that mean?

Goodenough: It means that those nonmember companies will have to figure out for themselves how to handle vacations, pensions, and welfare.

Bridges: Could we agree that a nonmember pays

a dollar an hour more?

Goodenough: That nonmember is dealing with you-not through a PMA member.

Bridges: We agree in principle. Let's find a way to do it legally.

Goodenough: That is spelled out in our April 8 document.

Bridges: This is another way of saying that they all must deal through a PMA member.

Goodenough: Yes. Then his work stops also. If a nonmember is dealing with a PMA stevedore, his work stops. Some do not use a PMA stevedore, and he takes the PMA member's business away. We want that chicanery eliminated. You have fragmented our industry.

At this point the notes contain a parenthetical statement reading as follows:

"(Discussion on Seatrain; nonmember companies' use of dispatch hall.)"

Bridges: You are saying, if we shut things down

it wrecks your Union.

Goodenough: Nonmember companies have continued to work during shut downs.

At this point the minutes disclose the following:

"(Discussion)"

Bridges: On this point, we agree in principle. We will have to make up our mind what we do.

August 30, 1971 Session-Forty-Third Meeting

The following colloquy occurred during the meeting:

Goodenough: On Page 12, Item XVI, Fringe Benefit Contributions.

Bridges: How do we do that?

Goodenough: Under the PMA Bylaws, we will offer membership.

Bridges: Put it this way-any contract we reached in the strike will only apply to PMA members. It will not apply to anybody else.

Goodenough: I am not sure what you are saying. Bridges: We'll only include PMA members in our contract and will not include any non-PMA members without your approval.

Goodenough: Right.

Bridges: So they will still be on strike. The agreement cannot apply to anybody without your approval. We could reach agreement with them at a slight charge. You don't need our permission for this. We see nothing wrong with it.

September 18, 1971 Session-Fifty-Eighth Meeting

In the meeting, the following colloquy occurred with respect to the container stuffing issue.

Flynn: We have the same problem with other ports who are not PMA members, but we have no answer. The easy way would be to force them into PMA.

Bridges: Is that what you propose?

Flynn: No. We are interested in protecting the work opportunity that normally would be under the Coast Agreement. The moving party—meaning you—should propose an answer. Will you give us a proposal?

Bridges: We will think about it.

Flynn: We have gotten involved with lawyers and we need language to protect the work and jurisdiction of longshoremen. It is needed for defense against legal entanglements. Such a preamble should be included in our document—it is not aimed at driving people out of business.

Bridges: We have to be careful of language. Language covering work, yes, but not jurisdiction.

Flynn: Some provision of the agreement could be held illegal. The tax—it is applicable to various kinds of cargo and could be held discriminatory. Would it apply to all cargo?

Bridges: Would that cover Sea-Land? He is a

member. Maybe a different tax.

Flynn: Do you mean to tax them less?

Bridges: Possibly. A load inside the zone—do they have the same tax?

Flynn: Yes. Any other questions?

Bridges: We have no interest in the tax. We want the guarantee.

September 19, 1971 Session—Fifty-Ninth Meeting In the meeting, the following colloquy occurred: Flynn: Do you have any proposal on the Port of Seattle? Give it to us in writing.

Bridges: Yes. We can always double handle.

Flynn: What about the other public docks who are not PMA members?

Bridges: Our agreement with the Port of Seattle is hanging fire.

Flynn: You are more effective with them—they pay no attention to us.

Bridges: At the moment, we have no answers.

September 24, 1971 Session—Sixty-Fourth Meeting

Appended to the minutes of that meeting was a PMA proposal dated 9/24/71 entitled "CFS Supplement". Two paragraphs of that proposal read as follows:

"Outbound cargo in containers stuffed within the port area CFS zone by ILWU labor employed by a nonmember of PMA will not be loaded aboard a vessel by a PMA member, unless such cargo is subsequently unstuffed and restuffed by a PMA member under the terms of the PCLCA or this CFS supplement."

"Inbound cargo in containers shall not move from the dock if destined for unstuffing within the port area CFS zone by ILWU labor employed by a nonmember of PMA, unless such cargo is first unstuffed and restuffed by a PMA member under the terms of the PCLACA or this CFS supplement."

January 11, 1972 Session-Eighty-Second Meeting

At a meeting the following colloquy occurred:

Bridges: On your zone concept didn't you propose double handling for nonmembers?

Flynn: Yes, but we can't have it for our mem-

Bridges: For our members we want double handling.

January 31, 1972 Session—Eigthy-Sixth Meeting

At the meeting, the first items of discussion were as follows:

Bridges: We'd like to discuss your demand for your closed shop. We think it's illegal but we think it's all right.

Flynn: There is no consensus on this side of the table that we'll go out on strike for this demand.

(The proposal as to nonmember participation was read). [Although the minutes of the protracted negotiations disclose that written proposals were invariably attached to the minutes of the meetings, in this instance the proposal as to nonmember participation is missing].

Bridges: We agree with that—supplemental agreements.

Flynn: If the supplemental agreements are better, we want the benefit of them.

Bridges: We mean better from our side. We are not against it.

Flynn: Take into consideration the New York case of freight forwarders using non-ILA labor. The court said it was proper for the New York Shipping Association to deny that company membership.

Bridges: I think we are talking about no nonmembers would be party to our funds.

Flynn: That's what we propose. Each company would be a member unless by law they can't join our association. By supplemental agreements we mean supplement to the plans.

Bridges: I assume you still have an escape clause for members. Now nonmembers under your proposal would have to become members.

Flynn: We'll give them a ninety day grace period. They can sign a letter of intent.

Bridges: If we sign an agreement with a non-PMA company that is the same or better than the one we negotiate and we do it right now, we would have to have a clause in that agreement saying they will join PMA.

Flynn: And by joining PMA they would be bound

by agreement with you.

Flynn: And to join our Union they have to abide by our agreements.

Bridges: You've always said no cheaper deals. Flynn: We've always said they should not be inconsistent with our contract.

Bridges: Let's say sixty days or no contract unless they join your Union.

Flynn: If an employer wants to participate in

the functions they have to join.

Bridges: What's the penalty if they don't?

Flynn: They would not be under our funds—welfare, pensions or vacation plan or be able to use the dispatch hall.

Bridges: How do we enforce that? It gets down to compulsory unionism. I promised the grain companies to explore this subject. If we sign up tomorrow, we could say unless they join PMA within thirty days that contract would be cancelled.

Flynn: We can't tell you what to do or a way to get around it. We would look at the agreement and if it is not inconsistent with ours we would admit that company. If we had not yet reached agreement with you, we would table their membership application until we did.

February 6, 1972 Session—Eighty-Ninth Meeting

During the meeting, the following colloquy occurred:

Flynn: Let's go over the other major items. We still have retroactivity and economic items remaining for discussion. Now the major items that are non-economic are (1) manning—LASH sh and RO-

RO; (2) clerks' jurisdiction; (3) PMA nonmember participation proposals; and (4) steady skilled men (being discussed at the local level).

Bridges: We said that if the Union follows a principle then we would make you whole. What's your nonmember proposal mean?

Flynn: We want the grain elevators to join PMA. Bridges: We agree that this contract won't cover grain ships until they join PMA.

Bridges: On your distressed ports we will accept as written. On all the other items let's negotiate until Wednesday night, then if no agreement we will go to the arbitrator, but it won't hold up a settle-

Kagel: Let's list them.

Bridges: IRS, grievance machinery, stop-work meetings, high-piling, industrial docks, nonmember participation, pending lawsuits, protection against dispatch call lawsuits, manning, clerks' jurisdiction, union's scope of work (industrial docks).

# February 8, 1972 Session—Ninety-First Meeting

At the meeting, Mr. Kagel, the arbitrator, stated as follows: "I request that we have a subcommittee available this afternoon for two purposes: (1) To go over all agreed documents and (2) Begin going over the noneconomic items. We can do this today and tomorrow and I now find I can do it on Thursday and Friday, if necessary."

Immediately following the February 8, 1972 meeting, a press conference was held at which time Mr. Kagel announced that the ILWU and PMA negotiating committees had reached agreement on all economic issues. The statement also stated that certain specific non-economic issues will be mediated and if necessary, arbitrated by Sam Kagel.

The non-economic issues having included PMA nonmember participation proposals, it must be assumed that either the nonmember participation agreement was reached by mediation or, possible arbitration by Mr. Kagel.

Dated this 8th day of December, 1972.

/8/ Alex L. Parks ALEX L. PARKS

Subscribed and sworn to before me this 8th day of December, 1972.

Charles in anthropies of the same and administrated

/s/ Shirleen R. Cason Notary Public for Oregon My Commission Expires: 3/23/76

# BEFORE THE FEDERAL MARITIME COMMISSION

[Received Dec. 15, 1972]

[Caption Omitted]

## AFFIDAVIT OF FACTS RELATIVE TO SEGREGATED ISSUE OF JURISDICTION

STATE OF OREGON )
COUNTY OF MULTNOMAH )

I, MILTON A. MOWAT, being first duly sworn upon oath depose and say: I am the Manager, Regulatory Affairs, of the Port of Portland, one of the petitioner ports. I make this affidavit on behalf of all of the petitioner ports in the interest of expedition and for the convenience of all parties concerned.

The matters set forth in this affidavit were supplied to me, at my request, by the cognizant officials of each individual port, for incorporation in this affidavit on behalf of all petitioner ports.

The relevant data is set forth for each petitioner port in the alphabetical order of such petitioner ports.

Geographical Location of Petitioner Ports

## Port of Anacortes:

Approximately the westerly one-quarter of Skagit County, Washington with the port facilities being located on Fidalgo Island primarily within the City of Anacortes, Washington.

## Port of Bellingham:

Whatcom Creek Waterway, City of Bellingham; Bellingham International Airport, northwest of Bellingham; South Bellingham; and Blaine, Washington Small Boat Harbor.

#### Everett:

Port Gardner Bay, bounded principally by Priest Point on the north near Marysville to Chenault Beach, near Paine Field on the south.

## Grays Harbor:

Co-extensive with Grays Harbor County, Washington, comprising 1,910 square miles.

## Olympia:

Co-extensive with the boundaries of Thurston County, Washington, at the southern end of Puget Sound.

## Port Angeles:

Co-extensive with the boundaries of Clallam County, Washington.

#### Portland:

Co-extensive with the boundaries of Multnomah County, Oregon.

#### Tacoma:

Co-extensive with the boundaries of Pierce County, Washington with its principal facilities being located in the Tidal Estuary of the Puyallup River within the boundaries of Fife, Washington and the City of Tacoma.

Principal Facilities of the Petitioner Ports

## Port of Anacortes:

Two ocean terminals, one water cargo berth plus several storage warehouses, a small boat marina, two utility class airports, an international ferry terminal leased to the State of Washington Ferry System, together with various parcels of land leased for commercial and industrial uses. The Port also owns equipment for cargo handling operations including lift trucks, a mobile crane, pallet boards and miscellaneous equipment.

## Bellingham:

North terminal, consisting of berths A and B end to end 1,500 feet long; berth B equipped with two 50-ton capacity rail-mounted, gantry cranes, track length 510'. Together with a barge-mounted 60-ton floating crane. Water depth at berths A and B are 34 feet mean low water. Rail barge transfer facility, 3-track span with direct connection to Burlington Northern Railway with switching facilities to the Milwaukee Road. Also, a 50,000 square foot transit shed space and 90,400 square foot sprinkled transit and warehouse space.

South terminal consists of one berth 450 long, with a water depth of 50 feet below mean lower low water, together with 118,000 square feet of sprinklered warehouse space together with a Burlington Northern Railway rail connection.

1,000 vessel capacity Squalicum Small Boat Harbor and industrial area with cold storage capacity to 60,000,000 pounds.

Bellingham International Airport:

Small boat harbor at Blaine, Washington with a 500 vessel capacity. The industrial fill at this location holds a varied group of enterprises as well as property for future industrial expansion.

## Everett:

Depository for alumina ore shipped from Jamaica, including a specially designed crane unloader, storage facility and load-out complex. Presently under construction, a log back-up storage and wood chip handling facility comprising 17 acres of dredged-fill. Current expansion includes a new concrete pier and proposed marine terminal which, when completed, will encompass over 50 acres of diversified facilities.

## Grays Harbor:

Six deep water shipping berths, transit sheds, heavyduty cranes, and outdoor cargo assembly areas together with associated marinas, an airport, industrial lands, industrial buildings and industrial development districts.

## Olympia:

Quay type ocean pier 2,100 feet in length backed by 70,000 square feet of transit sheds and 30 acres of open cargo yards, together with associated cargo handling equipment.

## Port Angeles:

Two deep water piers, providing three berths and a dolphin facility which provides two additional berths, together with all necessary associated cargo handling equipment.

#### Portland:

Marine facilities include three terminals with 22 general and specialized berths capable of handling containers, roll-on, roll-off, general cargo, motor vehicles, liquid and dry bulk commodities, including 1,100,000 square feet of covered area and 3,500,000 square feet of open cargo area to handle in transit cargoes. In addition, 8 storage warehouses for the combined storage capacity in excess of 376,000,000 square feet. The Port also owns and operates large quantities of industrial lands, as well as the Portland International Airport.

## Tacoma:

Seven general cargo berths with associated warehouse covered space in excess of one-half million square feet; cold storage facility with approximately 8,000 tons of available storage; two breakbulk container berths with associated warehouse space and 25 acres of container yard facilities; one berth for movement of bulk tallow; two bulk commodity berths, one handling principally import of ore concentrates, and the other handling alumina inbound to a backup storage facility of 150,000 tons; one grain outloading facility, 700 feet in length;

four berths for the handling of logs and other bulk and outside storage; associated cargo handling facilities including seven large cranes and other loading and unloading facilities. Also, a railroad yard facility capable of handling and storing 185 rail cars within the switching yard, plus operating tracks.

## **Total Investments of Petitioner Ports**

Port	Present Investment	Budgeted or Proposed
	\$4,506,816	\$700,000
Anacortes Bellingham	13,800,000	4,300,000
Everett	12,000,000 13,656,345	6,000,000 plus
Grays Harbor Olympia	5,592,423	4,419,000 570,000
Port Angeles	4,500,000 44,000,000	21,667,000
Portland		marine facilities only)
Tacoma	40,015,011	28,650,000

## Tonnage Handled by Petitioner Ports

# (Figures are from last available fiscal year)

	290,282
Anacortes	506,000
Bellingham	709,016
Everett	2,300,000
Grays Harbor	668,887
Olympia	866,000
Port Angeles	2,375,008
Portland	2,244,593
Tacoma	_,

# Total ILWU Payroll for Each Petitioner Port

## (Data for last available fiscal year)

Anacortes	\$246,242.54
	\$114,428.13
Bellingham	\$ 60,009.85
Everett	\$363,146.00
Grays Harbor	\$190,618.66
Olympia	\$112,193.09
Port Angeles	
Portland	\$2,994,520.00
Tacoma	\$1,491,652.68

# SERVICES PERFORMED BY PETITIONER PORTS UTILIZING ILWU PERSONNEL AND IMPACT OF IMPLEMENTATION OF THE SUPPLEMENTAL MEMORANDUM UPON THE RENDITION OF SERVICES

#### Port of Anacortes:

ILWU personnel utilized in servicing of vessels to and from dockside storage facilities, loading railcars and trucks, and performing handling and processing services in and about the warehouses. All cargo handled at the port utilizes ILWU members.

All marine facilities at the port are owned and operated by the port. There are no facilities leased to stevedoring companies or other members of PMA. Stevedoring companies, members of PMA, perform the work of loading and unloading cargo to and from vessels, utilizing ILWU personnel.

Local Contracts. Relates to storing of canned salmon in port's storage warehouses. ILWU workers may be called out on a minimum 4-hour basis to load out one or two trucks requiring not more than one-half day. This deviates from the Coast Agreement requirements and, if eliminated, would cost additional amounts for labor.

## Impact of the Supplemental Memorandum:

(1) If the port refuses to execute the Supplemental Memorandum, it would be denied to use of ILWU personnel. The ILWU would not permit any work to be performed directly for the port by non-ILWU personnel. Inability to employ ILWU personnel or non-ILWU personnel would result in the complete closure of the port's facilities. Based on 290,000 tons of cargo during the last fiscal year and applying the accepted benefit figure of \$15 per ton to the community, the resultant loss to the community in dollars would be \$4,350,000. In addition, the loss of additional payroll to personnel other than ILWU personnel would exceed \$200,000.

(2) If the port resorted to a different method of operation by contracting with PMA stevedoring companies to perform the services now being performed by the port directly, it would preclude any decisionmaking power on the part of the port with respect to its publicly owned facilities and result, as a practical matter, in delegating to such stevedoring companies all rate-making decisions. Inasmuch as the private stevedoring companies are necessarily tied to a profit-making status, this could, and undoubtedly would, result in diverting cargo to other ports where the stevedoring companies could operate more conveniently and economically, and the imposition of stevedoring and handling charges upon shippers and steamship companies which would not reflect properly the cost-of-service of such stevedoring companies. While the concentration of cargo flows in a few, selected ports might achieve certain operating efficiencies, it would result in severe losses to local producers, shippers and manufacturers whose business operations lie within the tributary area of the port.

(3) If the port executes the Supplemental Memorandum, it would entail an abdication of its responsibilities to the public whose monies built the port facilities; delegate to a private organization (the PMA) its legal authority with respect to labor policies and procedures relative to longshore and terminal employees; and would violate state laws government beginning.

erning public port bodies.

## Port of Bellingham:

ILWU personnel utilized in the usual terminal services associated with moving cargo from a land-based facility to shipside and vice versa, including loading and unloading rail cars and trucks, high-piling cargo for storage, handling of cargo from place of rest on the dock to the ship's gear and vice versa, and the checking of cargo.

All marine facilities at the port are owned and operated by the port. No operational areas or other

facilities are leased to other parties. Two locker spaces are rented to PMA stevedoring companies. These spaces are used exclusively for the storage of cargo handling gear. Stevedoring companies, members of PMA, perform the work of loading and unloading cargo to and from vessels, also utilizing ILWU personnel. All longshore and terminaling services in the port are performed by ILWU personnel exclusively.

Local Contracts. None.

## Impact of the Supplemental Memorandum:

See, generally, the data set forth above with respect to the Port of Anacortes. Based on 506,000 tons of cargo during the last complete fiscal year, and applying accepted benefit figure of \$15 per ton to the overall community, the resultant loss to the community in dollars would be \$7,590,000. In addition, approximately 125 direct port jobs, exclusive of ILWU personnel, would be terminated immediately, representing an annual payroll of \$1.1 million dollars. Approximately \$1.6 million dollars in annual terminal operations revenues would be lost. Such revenues are "new" monies coming into the port district from outside its tributary area to which a substantial multiplier effect must be applied.

ILWU personnel will permit no work to be handled at the port terminals if it relates to cargo handling. The question as to whether or not ILWU personnel would continue loading and unloading ships as employees of PMA stevedoring companies if the port were to hire non-ILWU personnel to perform its terminal services is purely academic. No such arrangement would be tolerated by the ILWU.

## Port of Everett:

ILWU personnel are utilized in all aspects of loading and unloading vessels at the facilities owned and operated at this port. The major work at the present

time involves loading logs from boom rafts from the water into ships and unloading alumina ore. Two of the six piers in the port district are owned solely by the port, the remainder being owned by private industry. Two of the private concerns have exclusions in using ILWU personnel and are therefore able to use their own personnel in loading vessels.

Impact of the Supplemental Memorandum:

Local Contracts. None.

See, generally, the data set forth above with respect to the Port of Anacortes. The same situation prevails at this port. Based on 709,016 tons of cargo during the last fiscal year and applying the accepted benefit figure of \$15 per ton to the community, the resultant loss to the community in dollars would be \$10,635,240. In addition, the loss of approximately half of the port's monthly salaried employees would be very substantial.

## Port of Grays Harbor:

All marine facilities at the port are owned and operated by the port. There are no facilities leased to stevedoring companies or other members of PMA. There are, however, two major terminal operations which handle log cargoes, both of which are owned and operated by private corporations which operate such facilities and the cargo handling operations incident thereto utilizing non-ILWU personnel in this instance the International Woodworkers of America. All cargo crossing the facilities of the port is received, sorted, stored, and handled to shipside by ILWU personnel on direct port payrolls. From the point that the cargo is placed under the cargo hook, it is then handled from that point to stowage in vessels, or from stowage in vessels to the dock alongside, by ILWU personnel in the employ of stevedoring companies who are members of the PMA. Local Contracts. Longshoremen who are engaged in receiving log cargoes, unloading such cargoes from trucks, and sorting and handling logs in the log yard, work an 8-hour day at straight time. This is a departure from the Coast Agreement practice of 6hours straight time and 2-hours overtime. Longshoremen also work in the equipment repair shop of the port. The local contract provides for a three shift operation, with the second and third shifts being paid from \$.30 to \$.55 additional pay per hour as a shift differential rather than being paid time and a half. This is a radical departure from accepted practices under the Coast Agreement. The port also has a special contract relating to a skill rate of \$.50 per hour for leadmen, log handling machine operators, boommen, crane operators, forklift operators and certain supervisors who are employed by the port on a permanent basis. These men are ILWU Local #24 personnel and are employed on a steady basis by the port. The benefit to the port is that these men work interchangeably at several skilled jobs but at the same skill rate, allowing for total flexibility. An additional local practice prevails in that the port pays holiday pay and vacation pay directly to the ILWU employees. Holiday pay is not incorporated in the Coast Agreement and direct vacation payments are in contravention to the Coast Agreement. Such payments, however, from the standpoint of the port, have provided a better working climate.

Impact of the Supplemental Memorandum:

See, generally, the data set forth above with respect to the Port of Anacortes. The situation prevailing at this port is identical.

Based on 2.3 million tons of cargo during the last fiscal year, and applying the accepted benefit figure of \$15 per ton to the community, if the port is denied the use of ILWU personnel, the resultant loss to the community in dollars would be \$34.5 million dollars. In addition, it would mean the complete closure of

the port and the loss of jobs by all port personnel other than those necessary in a mere housekeeping status.

## Port of Olympia:

ILWU personnel are utilized in all services connected with the transfer of goods between land and water carriers; i.e., terminaling services as distinguished from loading on and off vessels. All cargo handled at the port utilizes ILWU personnel.

All marine facilities at the port are owned and operated by the port. There are no facilities leased to stevedoring companies or other members of PMA. Stevedoring companies, members of PMA, perform the work of loading and unloading cargo to and from vessels, utilizing ILWU personnel exclusively.

Local Contracts. The local contract with ILWU Local #47 calls for the local to furnish cargo handlers in all categories, including non-skilled longshoremen, equipment operators, crane operators, crane maintenance men, foremen and checkers. This agreement conflicts with the Coast Agreement. Under the Coast Agreement, the port would be required to employ members of the ILWU Checkers' Union and the ILWU Foremen's Union, both of which are located in Seattle, Washington. This would require the payment of travel time to and from Seattle, resulting in a considerably higher and discriminatory per hour cost.

## Impact of the Supplemental Memorandum:

See, generally, the data set forth above with respect to the Port of Anacortes. The same situation prevails at this port. Based on 668,887 tons of cargo during the last fiscal year, and applying the accepted benefit figure of \$15 per ton to the community, if the port is denied the use of ILWU personnel the resultant loss to the community in dollars would be \$10,033,305. In addition, the loss of addi-

tional payroll to port personnel other than ILWU personnel would exceed \$92,000 annually.

## Port of Port Angeles:

ILWU personnel are utilized in providing handling service, i.e., delivery of cargo from last place of rest to the ship's work. All cargo handled at the port utilizes ILWU personnel.

All marine facilities at the port are owned and operated by the port. There are no facilities leased to stevedoring companies or other members of PMA. Stevedoring companies, members of PMA, perform the work of loading and unloading cargo to and from vessels, utilizing ILWU personnel exclusively.

Local Contracts. Relates to using checkers from the ILWU local rather than obtaining them from the Checkers' Union in Seattle. If this arrangement were terminated by virtue of the Supplemental Memorandum, it would result in additional travel expense and travel pay with respect to importing checkers from the Seattle area.

## Impact of the Supplemental Memorandum:

See, generally, the data set forth above with respect to the Port of Anacortes. The same situation prevails at this port. Based on 866,000 tons of cargo during the last fiscal year, and applying the accepted benefit figure of \$15 per ton to the community, if the port were denied the use of ILWU personnel, the resultant loss to the community in dollars would be \$12,990,000. In addition, the loss of additional payroll to personnel of the port other than ILWU personnel would be approximately \$350,000 per annum.

## Port of Portland:

The port employs three general categories of labor that are ILWU personnel. The dockmen, from ILWU Local #8, load and unload containers, rail cars, trucks, barges and operate lift-trucks, straddle carriers and cranes. The Local also supplies the mechanics that service, repair and deliver lift machines, cranes, and miscellaneous stevedoring equipment. Men from the Local are also used to act as sweepers and janitors. Local #40, the Clerks and Super Cargo Local supplies the port with all personnel receiving and delivering cargo. Such personnel also perform all of the record keeping necessary to maintain accurate records on the cargo as it crosses the docks and that cargo stored in the port's warehouses. Local #92, the Foreman-Walking Boss Local, supplies the foremen that supervise the longshore gangs. These three locals are the only source of labor which the port uses in its marine terminal operations. Such personnel have sole labor jurisdiction over the movements of cargoes over the public marine terminals operated by the Port of Portland. The port owns and operates all of the public marine terminals in Portland with two exceptions. These two exceptions are: The Matson Navigation Company lease from the port of approximately five acres of yard area and the preferential assignment of Berth No. 408 which Matson utilizes in handling container ships in the Hawaiian trade; and the Brady-Hamilton Stevedoring Company lease of the Sea-Land Service Dock to load logs for export to the Orient. There are specialized privately owned marine terminal facilities in the Portland area which handle bulk grain, limestone, wood chips, iron ore, salt, fertilizer, and paper products, but there are no other public marine terminal facilities except those

Local Contracts. The port has the privilege of obtaining "self-supervising checkers" from Local #40. It thus has the privilege of reducing the manning complement to only one man to receive and deliver cargo if the work load is at a minimum and the facility must be kept open. This one man can receive and deliver freight by himself without the necessity

owned and operated by the port.

of the port having to hire two men; i.e., a supervisor and a checker. Self-supervising checkers are now employed at warehouses #3 and 4 for the distribution of storage cargo. This local arrangement would be terminated if the Supplemental Memorandum is implemented.

## Impact of the Supplemental Memorandum:

See, generally, the data set forth with respect to the Port of Anacortes. The same situation prevails at this port. If the port is denied the use of ILWU personnel, and all operations cease over its public marine terminal facilities, the loss of revenue to firms and individuals in direct marine activities in the Portland community would be more than \$61 million dollars annually. This figure represents the direct loss of revenue to firms and individuals in maritime activities. It does not include the secondary loss to the community or the losses to exporters and importers that would either be precluded from competing in world markets or be disadvantaged by having to pay higher transportation costs between their markets and more distant ports. In addition, the loss of additional payroll to personnel of the port other than ILWU personnel would exceed \$1 million dollars annually.

If the port resorted to a different method of operation by contracting with PMA stevedoring companies to perform the services now being performed by the port directly it would place the stevedoring firms in a position to dictate the terms under which they would be willing to perform. The self interest of the stevedoring companies would prevail, either in the form of higher rates, or in reduced or eliminated services to the detriment of the shipping public. In the port's efforts to promote traffic, it obtains competitive bids from the stevedoring firms on certain movements of containers and bulk commodities. Under the present situation, the port has the option of performing the work itself. It has exercised this

option and has performed the stevedoring services in several instances. This flexibility promotes true competitive bidding.

#### Port of Tacoma:

ILWU personnel are utilized directly by the port in all terminaling operations performed on its facilities, including all car loading and unloading, handling from ship's tackle to place of rest in the warehouse, sorting to conform to bills of lading, recoopering, and all other miscellaneous services performed for the benefit of the cargo, the shipper, and the consignee.

In addition to the 17 ocean berths operated by the port, there are 6 additional berths for interchange of ocean commerce, operated by private organizations. None of these facilities are members of PMA, and obtain their ILWU personnel through the same joint hiring hall. Stevedoring companies, members of PMA, perform the work of loading and unloading cargo to and from vessels utilizing the port's facilities, using ILWU personnel.

Local Contracts. The port has a contract directly with the ILWU local, relating to all of its clerical, maintenance, railroad, watchmen and cleaning crews. It also has a contract with the Teamsters and Operating Engineers for the operation of its cold storage facilities. If the port were denied the use of the ILWU work force, ILWU members employed by PMA members to actually do the loading and unloading work aboard vessels, would refuse to handle cargo which was handled by non-ILWU members that in the past was performed by ILWU members. In short, it would result in complete closure of all port operations.

Impact of the Supplemental Memorandum:

See, generally, the data set forth above with respect to the Port of Anacortes. The same situation prevails at this port. Based on 2,244,593 tons of cargo during the last fiscal year, and applying the accepted benefit figure of \$15 per ton to the community, the resultant loss to the community in dollars would be \$36,688,895. In addition, the port employs 174 persons other than ILWU personnel. If the port were closed by the implementation of the Supplemental Memorandum, it would result in the discharge of the majority of these personnel.

DATED this 11th day of December, 1972.

/s/ Milton A. Mowat MILTON A. MOWAT

Subscribed and sworn to before me this 11th day of December, 1972.

/s/ [Illegible]
Notary Public for Oregon
My Commission Expires: 3/23/76

## BEFORE THE FEDERAL MARITIME COMMISSION

[Received Dec. 15, 1972]

[Caption Omitted]

## AFFIDAVIT OF RICHARD D. FORD

STATE OF WASHINGTON )
COUNTY OF KING ) 88.

RICHARD D. FORD, being first duly sworn, upon oath deposes and says that:

#### STATUS OF AFFIANT

1. My name is Richard D. Ford. I am the Deputy General Manager and Legal Officer of the Port of Seattle, an Intervenor herein. My business address is Post Office Box 1209, Seattle, Washington 98111.

2. In my capacity as General Manager of the Port of Seattle, I have an extensive knowledge of the marine terminal operations of the Port of Seattle. In addition, I have knowledge of marine terminal operations at United States West Coast Ports. I have personal knowledge of the matters contained herein.

3. This affidavit is made pursuant to an order of the Commission served October 19, 1972 severing jurisdictional issues for independent and expeditious determination.

## STATUS OF PARTIES

4. The Pacific Maritime Association (PMA) is a multi-employer bargaining unit representing steamship lines, stevedoring companies, and marine terminal operators on the United States Pacific Coast.

5. The International Longshoremen's and Warehousemen's Union (ILWU) represents employees engaged in longshore, marine clerk, and warehouse work on the United States Pacific Coast. 6. The Port of Seattle (Seattle) is a municipal corporation organized and existing under the laws of the State of Washington. The Port exercises public functions as a port district under the provisions of Revised Code of Washington (RCW) Title 53, and as a wharfinger and warehouseman under the provisions of RCW Title 81, Chapter 94. Pursuant to statute, the Port owns and operates both marine terminal facilities and warehouses. It derives its revenue, in part, from wharfage and dockage charges to ocean carriers and others, and from charges made for warehousing services offered to shippers and consignees. The Port of Seattle employs ILWU labor but is not a member of PMA.

7. Contractual agreements between PMA and ILWU generally govern the performance of longshore and marine clerk on the United States Pacific Coast and more particularly at marine terminal facilities owned and operated by the Port of Seattle. Work on the docks at the Port of Seattle is under the exclusive control of the ILWU. The Port of Seattle has independent contracts with ILWU Local 9 (warehousemen) and ILWU Local 52 (checkers). The Port of Seattle hires members of ILWU Local 19 (longshoremen) and ILWU Local 98 (foremen) on a regular basis but without formal contract.

8. Where the Port of Seattle has hired ILWU long-shore and marine clerk labor, it has done so on substantially the same terms and conditions as ILWU labor is hired by members of PMA. The Port of Seattle has utilized the services of PMA-ILWU hiring halls for the employment of longshore labor and has made equitable contributions to the maintenance of PMA-ILWU hiring halls and PMA-ILWU pension funds.

## STATUS OF PMA-ILWU CONTRACTS

- 9. Two PMA-ILWU agreements are the subject of this investigation:
- a. The Master Collective Bargaining Contract. The master collective bargaining agreement is entitled "Memorandum of Understanding" and was entered into between

the PMA and ILWU on February 10, 1972 (hereinafter referred to as the basic agreement). The basic agreement governs the performance of longshore and marine clerk work at West Coast Ports. The agreement was not complete but left certain specific areas subject to later agreements. Among these subjects was the status

of non-PMA employers of ILWU labor.

b. Supplemental Memorandum of Understanding No. 4. Supplemental Memorandum of Understanding No. 4 is entitled "ILWU-PMA Nonmember Participation Agreement" and was entered into on or about April 25, 1972 (hereinafter referred to as the nonmember agreement). The nonmember agreement was prepared in a form which was separate and apart from the basic agreement and which was to be executed by non-PMA members who employed ILWU labor.

## ACTS OF PMA TO COMPEL SEATTLE TO BECOME A PMA MEMBER

10. As will be shown herein, the nonmember agreement is not a bona fide collective bargaining agreement, but rather is, instead, a device designed by PMA to compel independent employers to join PMA or become subject to their regulation. The promulgation of the nonmember agreement is only the latest in a series of actions by PMA to compel the Port of Seattle, and other non-

PMA member ports, to join PMA.

11. The PMA has been and continues to be dominated, directed and controlled by ocean carriers, stevedoring companies and other who have their headquarters and large financial investments within the State of California. The voting and other provisions of its organizational agreement and bylaws of the PMA are designed to perpetuate the domination of such members over the policies and affairs of the PMA, no matter how many additional members are admitted. Should the Port of Seattle be forced to join the PMA, the Port of Seattle would consistently be outvoted on matters of concern to it; for example, ocean carriers have one vote for each 50,000 tons of cargo, while port members only have one vote; 11 of the 15 directors of the PMA are selected by ocean carriers and the other four are selected by the remaining members; 6 of the 7 director members of the PMA Executive Committee must be ocean carrier selectees; and the Board of Directors may by majority

vote suspend or expel any member.

12. On December 23, 1970, a letter was sent to the Port of Seattle, among other ports, from PMA, requesting those ports to join PMA. The letter threatened to exclude non-PMA members from the use of PMA-ILWU hiring halls and from participation in PMA-ILWU benefit plans. This threatened action would prevent the Port of Seattle from hiring longshore and marine clerk labor from ILWU Locals 19 (longshoremen) and 52 (checkers). As will be discussed below, such action would seriously disrupt the operation of marine terminal facilities at the Port of Seattle.

13. On January 29, 1971, representatives of PMA visited Seattle for the express purpose of soliciting non-PMA member ports, including Seattle, to join PMA. At a meeting of representatives from Northwest Ports, representatives of PMA again requested that the Port of Seattle become a PMA member.

14. On February 26, 1971, representatives of PMA organized a meeting of Pacific Northwest Ports at Sacramento, California, with the objective of compelling

the Port of Seattle, and other ports, to join PMA.

15. In June of 1971, just prior to the commencement of the Pacific Coast longshore strike, I had several telephone conversations with Mr. Ben Goodenough, Vice President of PMA and one of PMA's principal negotiators with the ILWU. Mr. Goodenough again requested that the Port of Seattle join PMA. Mr. Goodenough told me that unless Seattle joined PMA, Seattle could expect to be excluded from the use of PMA-ILWU hiring halls and from the participation in PMA-ILWU benefit plans. Mr. Goodenough made it clear that PMA did not intend to permit a major operating port like Seattle to remain outside PMA.

#### THE CFS AMENDMENT

16. On February 10, 1972, PMA and ILWU executed a Memorandum of Understanding containing a provision at page 25 and numbered paragraph 1.55 of the Container Freight Station Supplement which would have the effect of irreparably harming the business of the Port of Seattle. The subject provision would require that containers destined for non-PMA facilities employing ILWU labor (such as the Port of Seattle) be first unstuffed by a PMA member employing ILWU labor. This provision would not apply, by its terms, to a container destined for a facility operated by a PMA member. The practical effect of paragraph 1.55 (hereinafter referred to as the CFS amendment) was to require the double handling of maritime container cargo destined for Port of Seattle acquiesced to PMA's demands and became a PMA member.

17. On March 9 and 10, 1972, I had telephone conversations with the aforementioned Mr. Goodenough. Mr. Goodenough personally participated in negotiations conducted between the PMA and the ILWU. Mr. Goodenough told me that the CFS amendment was drafted to take care of what was regarded as "the Seattle problem" and the plain inference I drew from my conversation was that the PMA intended to penalize the Port of Seattle so long as Seattle remained outside the PMA.

18. On April 4, 1972, the Port of Seattle instituted an antitrust action against the Pacific Maritime Association, International Longshoremen's and Warehousemen's Union, and their affiliated members and locals for the purpose of enjoining implementation of the CFS amendment. Port of Seattle v. Pacific Maritime Association and Internationa! Longshoremen's and Warehousemen's Union, et al., United States District Court, Western District of Washington, Civil No. 214-72C2. An order has been issued by the Federal District Court for the Western District of Washington restraining the PMA and ILWU from implementing the provisions of the CFS amendment. The case is now awaiting trial.

#### THE NONMEMBER AGREEMENT

19. On July 24, 1972, the Port of Seattle received a letter from PMA and ILWU under date of July 20, 1972. A copy of the letter is marked "Exhibit A" and attached hereto, and is incorporated herein by this reference as if set forth in full herein. The letter was accompanied by a proposed form of nonmember agreement to be entered into between PMA, ILWU, and the Port of Seattle. The said nonmember agreement is marked "Exhibit B", is attached hereto and is incorporated by this reference as if set forth in full herein.

20. The letter which has been marked "Exhibit A" notified the Port of Seattle that it had until August 19, 1972 to execute the proposed nonmember agreement. The letter further advised that if the Port failed to agree to the joint demands of PMA and ILWU, the Port would be excluded from hiring longshore labor on the docks of the

Port of Seattle.

21. The terms of the proposed nonmember agreement limit use of longshore labor (Locals 19, 52 and 98) to PMA members and signatories of the nonmember agreement. (Paragraph 1 of Exhibit B). All separate contracts between the Port and ILWU locals (Locals 9 and 52) become subject to the overall provisions of the nonmember agreement and the basic agreement between PMA and ILWU. (Paragraph 2). A nonmember is required to employ ILWU labor on the same terms as members of PMA (3), and must specifically forfeit any advantage obtained by the employer through collective bargaining (Paragraph 3, note). Nonmembers are required to pay PMA dues, assessments, and to become liable for other obligations imposed upon PMA members (Paragraph 6). A nonmember is required to lock out ILWU members if PMA declares a lockout (Paragraphs 8 and 10). At the conclusion of the existing basic agreement, PMA is entitled to dictate labor policy during contract negotiations (Paragraph 9). The agreement is perpetual; PMA and ILWU must agree on any termination of the obligations imposed upon the nonmember (Paragraph 13).

22. The terms of the nonmember agreement would com-

pel the Port of Seattle to accept labor policy as dictated by PMA. The terms of the agreement are designed so as to make it more onerous to be a nonmember of the association than to be a member. A nonmember, for instance, is required to pay dues, but has no vote in the organization. Furthermore, while a PMA member may resign its membership, a nonmember is bound in perpetuity under the nonmember agreement. In summary, the nonmember agreement is only the latest and most blatent attempt to force the Port of Seattle (and other ports) into joining PMA.

#### SEATTLE REFUSES TO JOIN PMA

23. After a thorough consideration of the alternatives involved, the Port of Seattle advised PMA and ILWU by letter of August 2, 1972, that it would not accept the terms of the proposed nonmember agreement. A copy of the Port's letter rejecting the ILWU-PMA demands is marked "Exhibit C", attached hereto, and is by this reference incorporated herein as if set forth in full. As is stated in the letter, it is the policy of the Port of Seattle to remain an independent employer of longshore labor. The legislature of the State of Washington has vested in the Port Commission of the Port of Seattle the responsibility for the determination of labor relations policy for the Port. Execution of the nonmember agreement would constitute an unlawful delegation of legislative authority from the Port of Seattle to PMA. The Port of Seattle desires and intends to remain an independent operating Port.

24. As set forth in Exhibit D, the Port of Seattle stands willing to enter into an agreement with PMA which would enable the Port of Seattle to employ ILWU longshore labor on the same terms as it has in the past. The Port of Seattle stands willing to bear its fair share of PMA assessments for contributions to the maintenance of hiring halls, reasonable overhead expenses of PMA, and funding of joint PMA-ILWU employee trust funds.

## EFFECT OF DENIAL OF LONGSHORE LABOR

25. If the Port of Seattle is denied access to longshore labor from ILWU Locals 19, 52 and 98, the Port will be forced to immediately shut down the following marine terminal facilities owned and operated by the Port of Seattle: Terminals 20, 37, 90, 91, 102 and 115. The closure of these marine terminal facilities would seriously disrupt the flow of maritime commerce through the Port of Seattle.

26. The Port of Seattle is a leading west coast port for transpacific commerce. The Port has been, is now, and will be pursuing an extensive program for the acquisition of land, the construction of facilities, and the ordering of extensive equipment to handle maritime cargo. In particular, the Port of Seattle has concentrated on the development of containerized general cargo. The book value of the Port of Seattle's investment in marine land, facilities and equipment (including work then in process) in 1971 increased by over \$25,000,000.00 to in excess of \$137,000,000.00. This increase was due in substantial part to improvements in the Port's container handling capability. The Port has extensive plans for the further utilization and expansion of existing container facilities and for the development of new container facilities. If the Port were required to shut down its marine terminal facilities, there would be a substantial loss in revenue to the Port with an adverse effect to shippers and the public generally who now use and rely on the facilities of the Port of Seattle. It should be noted, in this connection, that marine terminal facilities of the Port of Seattle which are owned by the Port but leased to PMA members would continue to function. The effect of a denial of longshore labor to the Port of Seattle would close marine terminal facilities both owned and operated by the Port of Seattle, which facilities are enumerated above.

27. Denial of the use of longshore labor to the Port of Seattle would have a direct, serious, and adverse effect upon competition in maritime commerce and related industries both at the Port of Seattle and on the west coast of the United States generally. The Port of Seattle

is the largest "operating" port on the United States Pacific Coast. Many port authorities, particularly in California, are mere landlords of marine terminal facilities which are leased to PMA members. While the Port of Seattle leases some marine terminal facilities to PMA members, the Port of Seattle independently owns and operates the terminals which are enumerated in paragraph 25. If the Port of Seattle is denied access to ILWU labor, it will not be able to operate marine terminal facilities. The Port of Seattle may be forced to lease those facilities to PMA members, which would substantially lessen the competition for maritime traffic. If the Port of Seattle were required to close its marine terminals, there would be a substantial adverse effect on commerce and also a lessening of competition. The anticompetitive effect of a denial of access to longshore labor cannot be doubted, but the Port of Seattle stands prepared to offer additional evidence, including statistical information, on the effect of such a denial.

## PMA-ILWU NEGOTIATIONS

28. In my capacity as Deputy General Manager and Legal Officer of the Port of Seattle, I have knowledge relating to the course of negotiations between the PMA and ILWU which led to the conclusion of the basic agreement and nonmember agreement. In addition, the Port of Seattle has in its possession, and I have examined, copies of minutes from PMA-ILWU negotiating sessions between November 16, 1970 and February 8, 1972. These minutes provide some evidence as to the intentions of the parties in the execution of both the basic agreement and the nonmember agreement.

29. With regard to the basic agreement, the Port of Seattle has taken the position that the CFS amendment contained at page 25 and numbered paragraph 1.55 is an unlawful attempt by PMA and ILWU to adversely affect the competitive status of the Port of Seattle as an independent marine terminal operator. The basis of Seattle's claim is set forth in full in the Port of Seattle's Complaint on file in Port of Seattle vs. Pacific Maritime Association and International Longshoremens and Warehousemen's Union, et al. For reasons stated elsewhere, the Port of Seattle seeks a stay of this Commission proceeding to permit the Port to litigate the legal issues already raised in the context of the Port's lawsuit. In the event, however, that this Commission desires to fully investigate the terms of the basic agreement, the Port of Seattle requests the opportunity to produce evidence relating to the jurisdiction of the Commission over the basic agreement and the lawfulness of the agreement under the Shipping Act. Absent such a Commission determination, the Port of Seattle will defer the introduction of additional evidence relating to the basic agreement.

30. With regard to the PMA-ILWU nonmember agreement, a review of the facts shows that the agreement represents the type of activity which attempts to effect competition under the anti-trust laws and the Shipping

Act, 1916.

2 3

31. The purpose of the nonmember agreement is to compel independent Ports, such as the Pert of Seattle, into becoming PMA members. I have shown above that the PMA has engaged in a concerted effort over the past several years to compel the Port of Seattle to become a PMA member. Implementation of the nonmember agreement would compel the Port to become a PMA member because otherwise the Port would be denied access to the ILWU work force. Thus, the impact of what has been styled a "collective bargaining agreement" will lie not on the parties to the agreement but instead on non-PMA members. Furthermore, implementation of the nonmember agreement will have a direct result in the immediate termination of the use of the ILWU work force by non-PMA members.

## BARGAINING NOT IN GOOD FAITH

32. The collective bargaining which led to the nonmember agreement was not conducted in good faith. There was a prior design by PMA members to use the existence of the collective bargaining process to thrust unprecedented demands upon non-PMA member port authorities. The PMA-ILWU negotiating minutes show that on February 4, 1971, PMA submitted at the negotiating sessions a draft contract which was entitled number 4-A.

Paragraph XVI of that draft (page 18) provides in

pertinent part as follows:

"Amend all applicable sections of current agreement to eliminate nonmember participation under any provisions of the agreement unless such nonmember is prohibited by law from becoming a member of PMA. Amend all supplemental agreements to the Coast agreement to exclude nonmember participation on and after effective date of the new agreement."

The existence of PMA draft 4-A shows that PMA, and not the union, originated the demand for exclusion of nonmembers.

33. In later negotiating sessions, PMA representatives obtained the acquiescence of labor representatives in developing a program which would force nonmembers into joining PMA. On the 58th meeting of negotiators on September 18, 1971, the following dialogue was recorded between Mr. Edward Flynn, representing PMA, and Mr. Harry Bridges, representing the ILWU:

"Flynn We have the same problems with other Ports who are not PMA members, but we have no answer. The easy way would be to force them into PMA.

Bridges Is that what you propose?

Flynn 'No.' We are interested in protecting the work opportunity that normally would be under the Coast Agreement. The moving party—meaning you—should propose an answer. Will you give us a proposal?

Bridges We will think about it.

Flynn We have gotten involved with lawyers and we need language to protect the work and jurisdic-

tion of longshoremen. It is needed for defense against legal entanglements. Such a preamble should be included in our document—it is not aimed at driving people out of business."

Any fair reading of the dialogue contained above shows that PMA was looking for a device to force non-PMA members into joining PMA, but feared "legal entanglements". Mr. Flynn was suggesting to Mr. Bridges that if demands arose on behalf of the union, and those demands were "included in our document", the anti-competitive purpose of the agreement would be distinguished. Furthermore, PMA had met with failure in its organizing campaign and needed to use the ILWU as a weapon to force nonmember ports into line. This appeared in the next negotiating session, No. 59, which was held September 19, 1971. During that session, the following exchange occurred:

"Flynn What about the other public docks who are not PMA members?

Bridges Our agreement with the Port of Seattle

is hanging fire.

Flynn You were more effective with them—they pay no attention to us."

## SUBJECT OF NONMEMBER AGREEMENT

34. The subject of the nonmember agreement is not a proper subject of union concern. The status of non-PMA members is not a mandatory subject of bargaining and is not connected with wages, hours, or other terms and conditions of employment. The ILWU could have no proper concern in whether the Port of Seattle, or other ports, were members of PMA. The Port of Seattle had in the past contributed to the cost of maintaining ILWU-PMA hiring halls and ILWU-PMA pension funds. Insofar as longshore and clerk work is concerned, implementation of the nonmember agreement would not change one iota of the status quo insofar as hiring halls and pension funds are concerned. Instead, the agreement would confer upon PMA a new power which would actually be

detrimental to the interests of the union. In particular, the nonmember agreement requires that participants lock out longshoremen in the event that the PMA declares a work stoppage (paragraphs 8, 9 and 10 of the nonmember agreement). Thus, far from being in a proper area of union concern, the agreement would actually have a detrimental impact upon the union's bargaining position. In short, there is nothing in the nonmember agreement which would necessarily benefit the ILWU and which would cause the ILWU to negotiate for its implementation.

#### APPLIES TO NONMEMBERS

35. As its very title implies, the ILWU-PMA non-member participation agreement imposes terms on entities outside the collective bargaining group. It would belabor the obvious to expand upon this point.

## MANAGEMENT-UNION CONSPIRACY

36. The ILWU acted at the behest of the PMA in executing the nonmember agreement. The language cited above from the negotiating sessions evidences an attempt by PMA to obtain the cooperation of the union in establishing the nonmember participation agreement. In the negotiating sessions, the ILWU evidenced a willingness to cooperate with PMA to avoid "legal entanglements" in achieving PMA's anticompetitive plans. At an early negotiating session (No. 23) on March 26, 1971, PMA voiced concern that certain other provisions of the basic agreement might bring "nothing but lawsuits". Mr. Bridges replied as fellows:

"You are in a vice. We will get up in court and tell the judge that we forced this upon the Employers. This is not a violation of the Shipping Act. If you want 'insurance' on this, we will give it to you." (Page 5)

## ANTICOMPETITIVE EFFECT

37. If the nonmember agreement is not implemented, it will not prejudice any legitimate union concern. Seattle stands ready to enter into a nonmember agreement which would preserve the status quo and guarantee to PMA and ILWU an equitable contribution by the Port of Seattle to PMA-ILWU hiring halls and PMA-ILWU pension funds. Where the nonmember agreement goes beyond those objectives, however, the effect of the agreement is anticompetitive and strikes directly at the major regulatory concerns of this Commission under the Shipping Act, 1916.

# NEED FOR EVIDENTIARY HEARING

38. Seattle anticipates that the PMA and ILWU will present affidavits relating to the nonmember agreement which will assert that the nonmember agreement is a bona fide collective bargaining agreement which resulted from good faith negotiation. The Port of Seattle does not have in its possession copies of the negotiating minutes of those negotiating sessions which immediately preceded the execution of the nonmember agreement. Seattle submits that if the Commission is unable to determine on the basis of the information contained in this affidavit that the nonmember agreement is an anticompetitive device subject to the jurisdiction of the Commission under Section 15, Shipping Act, 1916, then the Commission ought to require an evidentiary hearing for the purpose of determining the intent of PMA and ILWU in entering into the nonmember agreement. The Port of Seattle also submits that it is absolutely essential that the parties to this proceeding have the availability of discovery to obtain additional information, including the production of PMA-ILWU negotiating minutes, relating to the course of negotiations between PMA and ILWU immediately prior to the execution of the non-member agreement.

STATE OF WASHINGTON

COUNTY OF KING

88.

Richard D. Ford, being first duly sworn, on oath, deposes and says: That he has read the foregoing affidavit, knows the contents thereof, and believes the same to be true as stated.

/s/ Richard D. Ford RICHARD D. FORD

Subscribed and sworn to before me this 14th day of December, 1972.

/s/ Michael B. Crutcher
Notary Public in and for the State of
Washington, residing at Seattle.

#### EXHIBIT "A"

July 20, 1972

[Received Jul. 24, 1972, Executive Dept., Port of Seattle]

Mr. J. E. Opheim, Manager Port of Seattle P.O. Box 1209 Seattle, Washington 98111

This is to inform you that each present nonmember who has an ILWU-PMA nonmember participation agreement will be permitted to continue under its present agreement for a period of thirty days from the date of this letter. On this basis each may use the PMA-ILWU joint work force and participate in the several plans

involved until August 19, 1972.

Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union have reached agreement on a new ILWU-PMA nonmember participation agreement. By agreement between the parties, all nonmembers who wish to participate in the use of the PMA-ILWU joint work force in the future will be required to participate under the terms and conditions of the enclosed form of Agreement. Therefore, we request that you date and sign the enclosed Agreement (in triplicate) and return the three copies to C. J. Myers, Treasurer, Pacific Maritime Association, P.O. Box 7861, San Francisco, California 94120. The signatures of the International of the ILWU, as well as PMA, will then be obtained and one copy will be returned for your files.

If you do not return the signed copies before August 19, 1972 then your company will no longer be considered as a nonmember participant in the use of this work force, and all the various considerations provided for in the Nonmember Participation Agreement will no longer ap-

ply to your company.

There is enclosed a schedule of the current payments for participation, with the effective dates of each, which are the same for members and nonmembers.

> INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

/8/ [Illegible]

/s/ [Illegible]

PACIFIC MARITIME ASSOCIATION on behalf of its members

/s/ Ed. J. Flynn

## Ехнівіт "В"

## ILWU-PMA NONMEMBER PARTICIPATION AGREEMENT

The PMA-ILWU jointly registered work force (hereinafter referred to as the "joint work force") exists as a result of the registration process beginning in 1935 under successive Pacific Coast Longshore and Clerks Agreements (herein called "PCLCA") and the Walking Bosses and Foremen's Agreement. These agreements have been between the Pacific Maritime Association and its predecessors (PMA) and the International Longshoremen's and Warehousemen's Union and its longshore, clerks and walking bosses/foremen's locals in California, Oregon and Washington (ILWU). The men in the joint work force have "jobs" in which they work on an interchangeable basis for the many business entities involved in or related to the movement of cargo to and from ships in California, Oregon and Washington. Some of these business entities are not members of PMA. The following provisions apply to such nonmembers of PMA.

1. A business entity not a member of PMA must participate in this ILWU-PMA Nonmember Participation

Agreement if it uses men in the joint work force.

2. The nonmember participant's separate ILWU contract must conform with the provisions hereof, and the provisions of the PCLCA governing the selection of men

for inclusion in the joint work force.

3. A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA. The nonmember participant shall obtain men, units of men and gangs of men through the allocation system operated by PMA, from the dispatching halls operated jointly by ILWU and PMA. If a nonmember participant obtains men within the joint work force other than through the allocation system or the dispatching system referred to herein, such nonmember participant shall thereafter be disqualified from use of the joint work force, subject to the conditions of paragraph 11 of this Nonmember Participation Agreement.

a. A nonmember participant may obtain and employ a man in the joint work force on a steady basis in the same way a member may do so. When such participant employs 2 man to work on a steady basis, it shall notify PMA immediately. On request from PMA, each such participant shall furnish to PMA a list of men it is using on a steady basis. Steady men shall participate in the Pay Guarantee Plan in accordance with the rules that are adopted by PMA and ILWU.

b. For purposes of 1.53 through 1.57 of the Container Freight Station Supplement (CFSS) of the PCLCA, a nonmember participant who uses the joint work force at terms and conditions of employment no more favorable to the nonmember participant than those provided under the PCLCA, including the CFSS, may be deemed to be a "member of PMA" insofar as it is so

using the joint work force.

Note: If a prospective nonmember participant has an agreement with the ILWU which provides for utilization of the joint work force at terms and conditions of employment more favorable to the nonmember than those provided under the PCLCA, including the CFSS, such nonmember must alter that agreement to conform to the PCLCA, including the CFSS, in order to become a non-

member participant.

4. The nonmember participant shall participate in the ILWU-PMA Pension Plan, the ILWU-PMA Welfare Plan, the PMA Vacation Plans (longshoremen and clerks, and walking bosses/foremen) and the ILWU-PMA Guarantee Plans (longshoremen and clerks/ and walking bosses/foremen) in accordance with the terms applicable to such participation. Such nonmember shall make payments into these Plans at the same rates and at the same times as members of PMA are to make the respective payments. Attached are statements of terms and conditions currently in effect with respect to such participation. Nonmember Participants shall be subject to the same audits as members of PMA.

5. The nonmember participant shall use the PMA central pay system and central records office and must sign the stand d forms of participation documents for the central records office and central pay system. Amounts due with respect to the central pay and central records system shall be paid to PMA at the time and in the

manner prescribed for members of PMA.

Note: The hours for which pay is described through the central pay office to any man within the joint work force, with respect to his being used by such nonmember pursuant to the terms hereof, shall be deemed hours of work for a PMA member company for purposes of determining the individual longshoreman's eligibility for vacations, welfare, pensions, pay guarantee, promotion, transfer, advancement in registered status, seniority, and all other aspects of his work history as a member of the joint work force.

6. Each nonmember participant shall pay to the PMA an amount equal to the dues, and assessments, that a PMA member would pay. Payments shall be made at the time the member would pay. Each nonmember participant shall be liable proportionately to meet any obligations of PMA or of the PMA membership with respect to any PMA action in the PMA-ILWU collective bargaining and contracting relationship that is covered by the terms hereof, including obligations accepted by PMA as being imposed by law.

7. If a nonmember participant becomes delinquent under paragraphs 4, 5, or 6 hereof no joint work force workers shall be furnished to the delinquent nonmember.

8. In case a labor dispute arises and there is a stoppage of the work that normally would be done under the PCLCA and the Walking Bosses and Foremen's Agreement, the nonmember participant shall be governed by the labor policy in regard to that work stoppage that is fixed by PMA in compliance with its By-Laws and to which notice thereof is given in writing to the nonmember participant by PMA.

9. Should there be a cessation of work at the end of the contract period of the PCLCA and the Walking Bosses and Foremen's Agreement, or thereafter while negotiations are continuing toward a renewal or substitute contract, the PMA labor policy as to what work shall be done and under what terms and conditions shall apply to each nonmember participant the same as it applies to PMA members provided written notice thereof is given by PMA to the nonmember participant. The nonmember participant so notified shall accept the PMA labor policy in regard to such situation as its labor

policy.

10. A nonmember participant who carries on work during any work stoppage within the PCLCA or the Walking Bosses and Foreman's Agreement contract period or during any post-contract strike or lockout in knowing violation of any labor policy of PMA referred to in paragraphs 8 through 9 hereof shall thereby terminate its right thereafter to obtain any workers from the joint work force. Any hours worked contrary to PMA labor policy during the period of any stoppage, strike or lock-out covered by paragraphs 8 or 9 hereof shall not be considered as hours worked for purposes of vacation, welfare, pension, seniority, availability for dispatch, etc.

11. Should any nonmember participant cease to have the right to obtain men through the allocation and dispatching system, such nonmember shall nevertheless continue under a duty to meet all of its obligations based upon its use of the joint work force including accrued obligations for PMA assessments and dues, obligations for retroactive and current assessments for fringe benefits, obligations to meet liabilities under paragraph 7 hereof, and all other obligations with respect to the pay of workers paid through the central pay office during the period of its participation in the use of the joint work force.

12. It is believed that all provisions of this agreement are now lawful, and it is assumed that they will continue to be lawful. Should there at any time be a determination that any portion of this agreement is contrary to law, the remaining provisions shall continue to be binding upon the parties unless ILWU or PMA gives notice of the termination of this entire agreement.

13. The ILWU-PMA Nonmember Participation Agreement shall be binding and continue in effect without a terminal date, unless jointly terminated by the PMA and ILWU. An entity may terminate its participation

only on such terms and conditions as may be mutually agreed to by the PMA, the ILWU and the participant. An entity that terminates its participation shall at such time no longer be eligible to employ men in the joint work force nor to participate in the Pension, Welfare, Vacation and Pay Guarantee Plans existing between ILWU and PMA.

Dated: —		
		Agreed to by:
		(Participant)
	Ву	
		Approved by INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

Approved by

PACIFIC MARITIME ASSOCIATION on behalf of its members EXHIBIT "C"

PORT OF SEATTLE P.O. Box 1209 Seattle, Washington 93111

August 2, 1972

Pacific Maritime Association P.O. Box 7861 San Francisco, California 94120

International Longshoremen's & Warehousemen's Union 150 Golden Gate Avenue San Francisco, California 94102

Re: ILWU-PMA Nonmember Participation Agreement

#### Gentlemen:

The Port of Seattle is in receipt of your letter dated July 20, 1972, together with your proposed form of "ILWU-PMA Nonmember Participation Agreement."

By your cover letter you advised that the Port of Seattle, as a nonmember of the Pacific Maritime Association, is required to enter into the ILWU-PMA Nonmember Participation Agreement before August 19, 1972, or suffer involuntary exclusion from the use of ILWU long-shore labor on the docks of the Port of Seattle.

You are aware that the Port of Seattle has traditionally employed members of the ILWU longshore work force and that it is essential to the operation of the Port's marine facilities that such traditional hiring be continued in the future. You are further aware that the Port of Seattle enjoys independent contracts with ILWU Locals 9 and 52 which are currently in full force and effect. The Port of Seattle has always paid its fair share of the cost of PMA hiring halls and contributions to joint PMA-ILWU employee trust funds.

The proposed nonmember agreement restricts the use of ILWU longshore labor solely to participants in the ILWU-PMA Nonmember Participation Agreement. Separate agreements between nonmembers and ILWU locals become subject to the overall terms of the Nonmember Participation Agreement. A nonmember is required to pay PMA dues in the same amount as a PMA member and also becomes financially liable for other PMA obligations. Nonmembers must observe work stoppages ordered by PMA. In summary, the proposed agreement confers upon an nonmember all the responsibilities of PMA members but without the right to vote to determine PMA policy.

The proposed agreement can only be designed to coerce the Port of Seattle, and other affected ports, into joining PMA. The Port of Seattle will not acquiesce in such a demand.

The Port of Seattle does not accept the terms of the proposed nonmember agreement. It is the policy of the Port of Seattle to remain an independent employer of longshore labor. Furthermore, the legislature of the State of Washington has vested in the Port Commission of the Port of Seattle the responsibility for determining labor relations policy for the Port. Execution of the proposed nonmember agreement would effectively delegate to PMA that responsibility. Apart from any other considerations, such a delegation of authority would be in violation of the law of the State of Washington.

The Port of Seattle stands willing to continue in its use of ILWU longshore labor on the same terms as it has in the past. The Port of Seattle will bear its fair share of PMA assessments for contributions to the maintenance of hiring halls, reasonable overhead expenses of PMA, and the funding of joint PMA-ILWU employee trust funds. The Port of Seattle would be willing to formalize those undertakings in a written agreement with PMA and ILWU. But the Port of Seattle cannot and will not delegate to the Pacific Maritime Association its authority to determine matters of labor policy.

This is a matter of vital importance. The Port of Seattle respectfully requests your early response to this letter. So that there is no misunderstanding, please be advised that in the event PMA and ILWU insist on implementation of the proposed nonmember agreement, the Port of Seattle will have no other option but to avail itself of whatever legal remedies it may have to insure the continued use of ILWU longshore labor and to resist efforts by PMA to coerce the Port into association membership.

Yours very truly,

/8/ Richard D. Ford RICHARD D. FORD Deputy General Manager

RDF:mn

## BEFORE THE FEDERAL MARITIME COMMISSION

[Received Dec. 15, 1972]

Docket No. 72-48

## AFFIDAVIT OF EDMUND J. FLYNN

CITY AND	COUNTY	OF SAN	FRANCISCO	)	
STATE OF	CALIFOR	NIA		í	88.

Edmund J. Flynn, being first duly sworn, deposes and says:

I am the president of Pacific Maritime Association. Pacific Maritime Association (PMA) is a maritime employers' collective bargaining association of some 120 steamship operators, terminals, stevedores and related companies covering the entire United States Pacific Coast, excluding Alaska.

After many years of relative peace on the waterfront, representatives of the PMA and the ILWU entered into negotiations for a new contract, the existing contract terminating June 30, 1971. I participated in all of the negotiations. The first official negotiating meeting took place November 16, 1970. Negotiations continued through ninety-one (91) meetings before the Memorandum Of Understanding dated February 10, 1972 was signed. On July 1, 1971, ILWU went on an extended strike.

The Nonmember Participation Agreement was not one of the subjects resolved by the February 10th Memorandum. It was included as a subject which would subsequently be resolved by further negotiation or mediation, and if not so resolved, be submitted to the Coast Arbitrator for decision.

The question of non-PMA members participation in the ILWU-PMA fringe benefit program and any other facets of the agreement between the ILWU and PMA was a matter of arms-length negotiation between the Union and the PMA from the beginning to the end of the fifteen months of negotiations leading to final agreement. At the very first meeting on November 16, 1970 the Union presented a document entitled "Contract Demands" which included the following:

## "XVI. Fringe Benefits Contributions

The contract provide that PMA will accept all fringe benefit contributions from any employer whether or not such employer is a member of the PMA."

At the second meeting of the negotiating committees held December 7, 1970, PMA presented its response to the ILWU's Contract Demands and PMA's Item XVI, Fringe Benefit Contributions, reads as follows:

## "XVI. Fringe Benefit Contributions.

The Employers propose that all applicable Sections of the Agreement be amended to eliminate non-member participation under any provisions of the Agreement unless they are not permitted by law to become members of the Association. Further, the Employers propose that all supplemental agreements to the Coast Agreement be amended as of July 1, 1971 to exclude nonmember participation."

It is apparent from the foregoing that the ILWU and PMA at the outset of the negotiations were at the opposite ends of the pole on the question as to participation by nonmembers in various programs jointly adopted and agreed to by PMA and ILWU. While nonmember participation was brought up from time to time in the course of a long period of negotiations, the parties were more directly concerned with the direct economic issues and, hence, this subject was not fully explored until after settlement of the other issues as I mention above. PMA repeated its same demands in a memorandum dated

April 8, 1971 listing their then current demands and from time to time during the negotiations the demand was repeated in some form.

Just prior to the February 10th settlement both parties presented their views to Mr. Sam Kagel, the Pacific Coast Arbitrator, and as a result of his suggestions and further negotiation the Agreement, Supplement No. 4, the principal subject of this investigation, was agreed

to between PMA and ILWU on April 25, 1972.

The historical background relating to the Nonmember Participation Agreement (Supplement No. 4) is pertinent to understanding its purpose. The PMA-ILWU joint workforce has been established since 1935 under a succession of Pacific Coast longshore agreements. The PMA and the ILWU have a jointly established and jointly supported hiring hall where the ILWU members register and from which they are drawn for work assignments. The PMA has established a highly sophisticated and workable central payroll and record keeping system for such employees. Such employees also participate in various fringe benefits negotiated collectively between PMA and ILWU including a pension plan, a welfare plan, vacation allowances program, the prior Modernization & Mechanization Fund, and under the Agreement of February 10th, the Pay Guarantee Plan. A monumental amount of effort by PMA staff and its members, as well as by ILWU has gone into the pension, welfare and vacation programs over a period of at least two decades. From labor's standpoint the fringe benefits constitute a sizeable part of the longshoreman's overall income.

Employers who were not members of PMA and who have negotiated separate contracts with ILWU have been allowed through supplemental participation agreements to participate in these plans and to have the benefit of the hiring hall and the joint workforce. This is an obvious advantage to nonmembers, not only in having available the PMA-ILWU workforce but also having the substantial economic benefit of funded programs involving thousands of employees, rather than to have to establish such pension, welfare and other programs for a very few employees. On the other hand, it has also

created additional administrative burdens to PMA to have nonmembers participate in some joint ILWU-PMA

programs but not necessarily in all.

While a nonmember has been thus permitted to have benefits of the efforts of PMA in establishing a joint workforce and to have a choice of the fringe benefits, they have not had to suffer the consequences of labor disputes between PMA and ILWU. As a result, the nonmember while having the advantages of nonmember participation in PMA's fringe benefit programs, has at times been able to obtain men from the PMA-ILWU joint workforce and in fact draw cargo which PMA members would otherwise have loaded or discharged while PMA members are shut down. This creates an obvious competitive disadvantage to PMA members.

From the Union's standpoint there is an advantage in having some of its members able to continue to work for nonmembers when PMA members operations are shut down. On the other hand, as has long been recognized by Mr. Bridges, president of the ILWU, there are advantages to the Union in having the employers unified on a coastwise basis. This has been a goal of the Union

as well as PMA.

It was in no sense the objective of PMA in seeking the Union's agreement to the Nonmember Participation arrangement to eliminate any employers of longshoremen on the Pacific Coast or put anyone out of business. Basically the PMA reached the conclusion that the current situation in which nonmembers obtained all of the benefits and had none of the obligations in connection with the PMA-ILWU joint workforce was grossly inequitable, difficult to administer, put the members at a competitive disadvantage and should not continue.

The nonmember employers with which the PMA was most concerned were those stevedoring employers who loaded or discharged cargo using the PMA-ILWU joint workforce and availed themselves of the fringe benefits and PMA services while taking advantage of work stoppages involving PMA. The public ports rarely do stevedoring, do not load and discharge ships themselves and hence do not concern the PMA members and PMA labor

policy in the way the nonmember stevedoring companies

PMA clearly desires to have as many employers of longshore labor as possible become members of PMA and to this end from time to time not only the industrial dock organizations but also the public ports have been solicited. But for those who do not choose to be members, the Nonmember Participation Agreement (Supplement No. 4) holds out to nonmember employers the opportunity to have many of the benefits of PMA membership but at the same to incur some of the obligations.

Not only was it not the motive of PMA and ILWU in Supplement No. 4 to put any nonmembers out of business or injure them but also the agreement does not have that effect. In the first place neither joining PMA nor entering into a nonmember agreement are onerous; secondly, ILWU and nonmembers have full freedom to enter into collective bargaining contracts; and thirdly, longshoremen and clerks are available outside the ILWU-

PMA joint registered workforce.

There is no agreement between PMA and ILWU that would prevent ILWU from supplying labor to anyone. There is no agreement expressed or implied between PMA and ILWU as to the terms negotiated with a nonmember must be equal or better than those negotiated with PMA. Nor is there any agreement between PMA and ILWU that would require a nonmember stevedoring company, terminal company, public dock or steamship company to employ PMA-ILWU registered longshoremen unless such company desired to participate in the PMA fringe benefits. In the past if the Union and a nonmember negotiated a contract which included PMA's benefits they would have to get PMA's consent to use the PMA administrative machinery for such benefits. In sum, neither ILWU nor nonmembers are restricted in bargaining with each other by the Nonmember Participation Agreement (Supplement No. 4) under investigation.

There are longshoremen and clerks who are members of the ILWU and who are not a part of the PMA-ILWU joint registered workforce. There are also workers

of nonmembers who perform functions of longshoremen and clerks on the Pacific Coast who do not belong to the ILWU. Further, there is nothing to prevent another nonmember starting his own workforce and providing his

own fringe benefits.

Thus, any nonmember of PMA who does not choose to sign the Nonmember Participation Agreement or join PMA is not prevented from continuing or beginning any business. The principal difference between the situation before the new Nonmember Participation Agreement (Supplement No. 4) and after it is implemented is that such participating nonmember could no longer pick and choose which part of the total package he desires. He also can no longer have the benefits without concomitant responsibilities.

One of the obligations which petitioners object to is the provisions of Article 6 that the nonmember participant shall pay to the PMA "an amount equal to the dues and assessments that a PMA member would pay." In theory, this provision is imminently fair. Why should PMA members subsidize nonmembers? In practice this provision makes little or no change in the payments now made by nonmembers who use the joint workforce and participate in the fringe benefits. Such a nonmember has always paid (and is still paying since Supplement No. 4 is suspended) manhour dues which helps defray the cost, though not the entire PMA cost, of dispatching hall and administration of the fringe benefit program. The other dues or assessments paid by PMA members are tonnage dues. These dues are paid by the vessel operator if he is a PMA member. If the vessel operator is not a PMA member then the tonnage dues are paid by the stevedoring company. However none of the petitioning ports are stevedores, none of them load or unload ships themselves. So they do not now pay the tonnage dues and they would not pay tonnage dues on signing the Nonmember Participation Agreement,

Supplement No. 4 does require that the nonmember who signs the agreement use the PMA central pay system and central records. There is an assessment to defray the cost. Most nonmembers who use the joint workforce now use the PMA central pay system and central records. It is a bargain. The cost is far less than would be incurred if the nonmember were to undertake the functions of the central pay system and central records on their own. There is an advantage in maintaining complete records and in coordinating payments through PMA's central pay system. In fact, it is a great administrative inconvenience to the longshoremen and to the employer of longshoremen if the employer does not use PMA's central pay system. This is one of the reasons to require its use by those who sign the Nonmem-

ber Participation Agreement.

Supplement No. 4 would also require a nonmember who signs the Participation Agreement to abide by PMA's labor policy. Simply stated that means if PMA members are denied use of the hiring hall and denied the use of longshoremen through a strike, nonmembers would agree not to use the hiring hall and not to employ ILWU longshoremen. On the other side of the picture, if PMA determined that its labor policy called for a legitimate lockout and members refused to employ ILWU labor, the nonmembers would do so also. This is a part of the belief by PMA that nonmembers should not be permitted "to have their cake and eat it too." Nor should PMA members be placed at a competitive disadvantage vis-avis nonmembers. Some of the examples of what has occurred in the past and which makes this provision necessary and reasonable are outlined in the Affidavit of Mr. Ben Goodenough.

I should like to stress that the Nonmember Participation Agreement in all its aspects has been a frequent subject of discussion and collective bargaining between PMA and ILWU. It directly relates to the typical collective bargaining matters of the mechanics of the use of the hiring hall, distribution of the workforce, availability of the important fringe benefits including pensions, welfare, vacations and pay guarantees, and the orderly administration of such programs.

/s/ Edmund J. Flynn
EDMUND J. FLYNN
President
Pacific Maritime Association

Subscribed and sworn to before me this 14th day of December, 1972.

/s/ [Illegible] Notary Public

## BEFORE THE FEDERAL MARITIME COMMISSION

[Received Dec. 15, 1973]

Docket No. 72-48

#### AFFIDAVIT OF B. H. GOODENOUGH

CITY	AND	COUNTY	OF	SAN	FRANCISCO	)	
STAT	E OF	CALIFOR	NIA			)	88,

B. H. Goodenough, being first duly sworn, deposes and says:

My name is B. H. Goodenough. I am Vice President, Shoreside Labor Relations, Pacific Maritime Association where I have been employed for fifteen years. I have been an active participant in all negotiations for collective bargaining agreements between Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union since 1957, and am responsible for employer contract administration of those agreements.

The subject of the participation of nonmember companies and entities who utilize the PMA-ILWU jointly registered workforce has been a matter of concern for both the Union and the employers for many years. The basic concern of the employers hinges around specific problems involving nonmembers. A terse description of the major problems is as follows:

(1) Certain nonmembers have been able to work during periods of strikes and work stoppages when PMA member companies could not work. For example, during the PMA shutdown of the Port of Los Angeles-Long Beach in November and December of 1968, referred to below, National Metals Company at Los Angeles-Long

Beach Harbor continued to work; and during the most recent longshore strike, a company operating in the Puget Sound Area, known as Foss Alaska, continued to employ longshore labor and handle cargo all during the strike.

(2) Certain nonmember companies have been given preference by being able to secure men during gang shortage periods when member companies, who receive men through the allocations procedures, were forced to remain idle or work with less gangs of men than their normal entitlement. This forced idleness and has caused losses to PMA members in vessel operating expenses and in loss of cargo.

(3) Certain nonmembers have been able to arrange with certain-International Longshoremen's & Warehousemen's locals for a steady workforce, a privilege not readily granted, if at all, to member companies, thus depriving members of maximum utilization of the PMA-ILWU joint workforce on days when the nonmember has work available. However, if reduced work opportunity occurs in the nonmember entity operation, the nonmember steady men go to the joint dispatching hall and accept work for member companies.

Agreements with nonmembers allowing them to participate in the particular fringe benefits they choose have existed in the West Coast longshore industry since about 1950.

As a result of those listed practices, nonmembers who signed nonmember participation agreements for the various fringe benefits negotiated for the ILWU workforce, and such nonmembers who utilized the joint dispatch halls and Pacific Maritime Associations's central record offices had accrued to them all of the advantages of the collective bargaining agreements and services of Pacific Maritime Association. They suffered none of the unfavorable situations accruing to members when conflict arose between the parties signatory to the collective bargaining agreement, namely, Pacific Maritime Association and the International Longshoremen's & Warehousemen's Union.

Over the years the difficulties arising from the foregoing situations have been the subject of many discussions between the PMA and ILWU at the Coast level, and also have been discussed in formal joint Labor Relations Committee meetings at the local levels.

Certain typical examples will serve to bring the subject into focus as related to the collective bargaining that took place in 1970, 1971 and 1972 on this issue, and resulted in the agreement signed by the parties covering nonmember participation. Such agreement is identified as No. 4 Supplement to Memorandum of Under-

standing, April 25, 1972. Those examples are as follows:

(1) During the months of November and December, 1968, a dispute arose between PMA and ILWU in the Port of Los Angeles-Long Beach. Jointly employed local area arbitrator handed down a ruling which, by contract, was binding on both parties. The local union refused to abide by the ruling. PMA companies then made a policy decision to close down the port until contract compliance was accomplished. While member companies all were bound by this policy decision, nonmembers continued to work, utilized the PMA-ILWU jointly registered workforce and, in addition, booked cargo that normally would have gone to member companies.

(2) During the months of May and June, 1970, a member of PMA got into a dispute with an ILWU local in the Port of Portland. Again, the area arbitrator handed down a decision. The Union refused to comply. A policy decision, was made to order no longshoremen for ships in that port until the ship involved in the dispute worked in accord with the area arbitrator's ruling. Aside from the time, effort, and expense involved in that case, after a period of no work in that port, the employer involved made a separate deal with the local, resigned from PMA, and then requested that it be permitted to sign nonmember participation agreements for the various fringe benefits and continued to utilize the PMA-ILWU jointly registered workforce and PMA's central records office facilities.

Items of this nature, combined with others of a less dramatic nature resulted in the Board of Directors of Pacific Maritime Association, passing a resolution, at its regular quarterly meeting on March 11, 1970, which is attached as Exhibit A (it should be noted that the second example stated above occurred after the passage of the attached resolution, but it is an example of the type of problem that has existed and kept repeating it-

self over a long period of time).

It was recognized by the Board of Directors that the implementation of that resolution could not be done unilaterally by the Association because, in order to put it into operation, a modification of the collective bargaining agreement, and certain supplemental agreements thereto, was required. This called for bargaining with the ILWU. Inasmuch as the then existent agreement had a terminal date of June-30, 1971, it was decided by the Employers that they would seek the necessary contract revisions when the negotiations for the new agreement began. The Union was aware of the passage of this resolution and also was aware that the Association had refused to grant nonmember status to the entity referred to in item (2) immediately preceding, that is the incident which occurred in May and June of 1970.

Though the collective bargaining agreement negotiated in 1966 did not terminate until June 30, 1971, the parties agreed late in 1970, in recognition of the many problems they had to discuss, to open negotiations at an early date. The first meeting between the parties occurred on November 16, 1970 at which time the ILWU presented its contract demands dated 11/6/70 and revised as of 11/13/70, in an eight-page document. In light of their knowledge of the resolution passed by the Board of Directors of PMA (Exhibit A attached), and the Association position in regard to the nonmember participation status of the above referred to employer who had resigned from PMA, the Union included as Item XVI in their demands a section headed "Fringe Benefit Contributions" which read as follows:

"The contract to provide that PMA will accept all fringe benefit contributions from any employer, whether or not such employer is a member of the PMA." Following receipt of those demands, the employers took time to analyze them and the second negotiating session for the new agreement took place on December 7, 1970, at which time the employers gave a written response to the demands that had been submitted by the Union, in the form of a letter addressed to the ILWU, Attention of Mr. Henry Bridges, and signed by B. H. Goodenough. Item XVI of that response dealing with the question of fringe benefit contributions read as follows:

"The employers propose that all applicable sections of the Agreement be amended to eliminate nonmember participation under any provisions of the Agreement unless they are not permitted by law to become members of the Association. Further, the Employers propose that all supplemental agreements to the Coast Agreement be amended as of July 1, 1971 to exclude nonmember participation."

Thus, at the outset of negotiations PMA and the Union proposed entirely opposite treatment of nonmember par-

ticipation.

There were, during the course of negotiations for the new agreement which lasted from November 16, 1970 until an agreement was signed on February 10, 1972, references to the nonmember participation situation in numerous discussions. I think it is proper to state that there were no definitive negotiations on the subject. The parties were so deeply involved in the issues of guaranteed annual wage, containerization, major changes in the pension plan, and major economic items such as wages and other fringe benefits aside from pensions, that while this item was referred to from time to time in the negotiations, it was never given close analysis and scrutiny. During the latter days of the negotiations, in the second part of the strike which took place early in 1972, the parties called upon the services of Sam Kagel, the permanent Cost Arbitrator for the PMA-ILWU Agreement, to serve as a mediator to see if resolution of the remaining unresolved items could be brought about. This was in the week prior to the final settlement which occurred on February 10, 1972. During those discussions,

with Mr. Kagel present, the parties presented their respective opposing positions on the subject of nonmember participation, and I think it is proper to say that they both interpreted the remarks of the mediator to imply "A plague on both your houses!" The issue was not resolved when the final Agreement was signed, but was included in a list of unresolved items, eleven in number, on which the parties agreed—when they signed the February 10, 1972 Memorandum of Understanding—they would endeavor to resolve by further negotiations or mediation and, if those two processes failed, the ultimate resolution would be placed in the hands of the Coast Arbitrator, Kagel, and his decision would be final and binding.

Thus, following the conclusion of the strike, and the signing of the Memorandum, the parties set out to resolve—through negotiation—the unresolved item just mentioned. Early in the last week of February, 1972, the parties met on this subject and PMA presented to the Union committee a document entitled, "Suggested Approach to Nonmember Participating Agreement Issue," which is attached as Exhibit B. The parties discussed this draft document. The Union indicated they would like to have time to study it and prepare a response. The parties met again on February 25, 1972 and the Union responded with a document entitled, "ILWU Response to PMA Suggested Approach to Non-Member Participating Agreement Issue." This is attached as Exhibit C.

There then followed a series of meetings between the parties, and a continuing and progressing exchange of documents as they neared resolution. The first of those is attached as Exhibit D, entitled, "Supplemental Memorandum Of Understanding—Draft, March 3, 1972." That was followed with another draft dated March 6th, attached as Exhibit E, and revision of that document through the process of collective bargaining finally brought about the document which the parties signed, identified as No. 4 Supplemental Memorandum of Understanding, dated April 25, 1972, signed for PMA on behalf of its members by B. H. Goodenough, and for the

International Longshoremen's & Warehousemen's Union by W. T. Ward.

During the course of negotiation on this document, I checked with and received advice and counsel from PMA legal counsel, in order to be assured that the negotiated instrument was a proper document, and it was with affirmative assurance to that effect that I signed

Supplement No. 4.

There has been a long history of nonmember participation in the benefits established by FMA and by the joint efforts of PMA and ILWU, and there are valid reasons why an agreement has to be established between the parties covering this important facet of our over-all operation. Some of the reasons of the employers have been detailed in the introductory statements in this affidavit, leading up to that part of the affidavit dealing with the negotiations. This type of agreement is also of benefit to the Union. It certainly serves to the Union's best interests in organizational activities, and in maintaining their over-all jurisdiction for employment covered under the Section 1 of the Pacific Coast Longshore Contract document to be able to provide for PMA-ILWU registered workmen, working for nonmembers, the benefits that have been negotiated for those members with PMA. Anyone familiar with the West Coast labor relations in the maritime industry, as well as outside the maritime industry, is aware that the PMA-ILWU fringe benefit plans on pensions, welfare, and vacations, as well as the PMA services in regard to the administration of the various Trust Agreements arising from those plans, along with the payroll and record keeping services rendered by PMA, give the ILWU employees benefits equal to and in many instances better than provided in other industries.

There is also the advantage to the ILWU that the fringe benefits and the various services rendered by PMA, can be maintained at a lesser cost when 11 to 12 thousand employees are included than would be the fact for a small group of employees for a single employer.

The foregoing are also benefits which inure to the nonmember participating companies.

Therefore, both Pacific Maritime Association and International Longshoremen's & Warehousemen's Union have a basic interest in providing a reasonable solution for nonmember participation. Obviously we had differences of opinion as to how this should be accomplished. This is probably best exemplified by referring to the opening paragraphs of this affidavit, wherein I quoted the Union's initial demand to this issue as opposed to the employers' initial position. Out of this grew the necessity to bargain collectively over the issue and what we did. Both sides in the collective bargaining process made concessions but, when the document was completed, it was the judgment of both parties that each had accomplished some of its objectives and had arrived at a satisfactory solution to a problem which had been a constant source of irritation for both Union and management for many years dating back almost to the establishment of the

ILWU-PMA hiring hall in 1985.

Simplistically, the Union, when it negotiates a separate contract with an employer who is not a member of PMA, would like to have employees employed by such nonmembers afforded the same benefits as employees employed by members, but without any obligations. PMA members on the other hand are placed at a competitive disadvantage by letting nonmembers pick and choose fringe benefits on a piecemeal basis and have accrue to them, without paying the full cost, those fringe benefits which they would like to have but permit nonmembers to ride free and clear of any of the normal employer obligations that arise in the labor relations between Union and employer. Further, the PMA members are at a competitive disadvantage where nonmembers enjoying the benefits of the contract can get favored treatment in regard to the utilization of the workforce, the employment of steady men, the privilege of working when members cannot, and even going so far as to take advantage of that latter situation and handle cargo which would otherwise be handled by members during strike or stoppage periods.

There also must be considered in this total situation the fact that nonmember participation is a beneficial thing As stated above, it gives them the opportunity to participate in the various fringe benefits in a coverage basis including a large number of people at a much lower cost to them. It also affords them the opportunity to have their payrolls processed through PMA and the administration of fringe benefit trusts handled by PMA and the Union signatory to the basic agreement. There is no doubt that utilizing the services offered by PMA is cheaper than the individual nonmember company handling the same things for itself.

From a labor standpoint, we have worked under a coastwise contract for many years and in dealing with the Union in collective bargaining for the entire Coast, the stability of the industry is better assured if all of those who are using the workforce and are operating under the terms of the agreement are in the same camp. The Union operates as an entity, whereas the employers—with the nonmember situation in the status it was prior to the nonmember participation agreement being signed—are forced to operate without assurance that they have the support of all of those who participate in the outcome of the bargaining.

As stated in the resolution (Exhibit A) which was passed by the Board of Directors, the employers sought assurance that "it (the resolution) would provide greater bargaining strength within the Association, as well as greater solidarity to resolve disputes."

There is no doubt that there is solidarity within the Union. With the nonmember company situation unresolved, it is obvious that there is no solidarity among the employers.

/s/ B. H. Goodenough B. H. GOODENOUGH

Subscribed to and sworn to before me this 14th day of December, 1972.

/8/ [Illegible]
Notary Public

EXHIBIT A to B. H. Goodenough's Affidavit

EXCERPT FROM MINUTES OF REGULAR QUARTERLY MEETING OF BOARD OF DIRECTORS

BARGAINING STRENGTH OF THE ASSOCIATION:

March 11, 1970

The Chairman reported that the Coast Executive Committee recommended to the Board of Directors the adoption of the following resolution in regard to non-members:

"It is hereby resolved by the Board of Directors of PMA that: .

"1. Subject to the provisions of Article IV, Section 1 of the PMA By-Laws, membership in PMA is open to any employer who directly or indirectly employs employees represented by unions with whom PMA has collective bargaining relationships. The Board of Directors shall continue to have the power to deny membership to applicants who have a collective bargaining contract that conflicts with any PMA collective bargaining contract and the conflict does not appear to be resolvable.

"2. In the future, any employer who directly employs such employees, and who is not a member of PMA but who is eligible for membership, will not be allowed to share in the use of the facilities and services that PMA operates individually as part of its labor relations activities, or operates jointly with unions in conjunction

with its collective bargaining commitments.

"3. PMA will offer membership to each non-member who is now sharing in the use of the aforesaid services and facilities. These non-members who directly employ such employees will be asked to become members within a reasonable period of time and assume the obligations of membership, or to withdraw from any use of these facilities and services."

The Chairman explained the resolution and the purpose for it by stating that it would provide greater bargaining strength within the Association, as well as greater solidarity to resolve disputes.

Considerable discussion then occurred as to the resolution following which it was duly moved, seconded and unanimously carried that the resolution as presented above be adopted.

#### EXHIBIT B

# SUGGESTED APPROACH TO NONMEMBER PARTICIPATING AGREEMENT ISSUE

#### Basic Problems with Nonmembers

- Certain nonmember companies have been able to work during periods of strikes and work stoppages when members could not work.
- Certain nonmembers have been able to secure men during gang shortage periods when member companies who receive men through the allocations procedure were forced to remain idle or work with less gangs or men than their normal entitlement.
- 3. Certain nonmembers have been able to arrange with the ILWU for a steady work force thus depriving members of maximum utilization of the jointly registered work force on whatever days the nonmember has work available. However, if reduced work opportunity occurs in the nonmember company the nonmember's steady men then go to the joint dispensing hall and accept work for member companies.

In order to solve those basic problems and still permit nonmembers to participate in the various fringe benefit plans and use the joint dispatching halls the following suggestions are submitted.

1. Any nonmember who has signed nonmember participating agreements and who employs a steady work force by arrangement with an ILWU local or locals or the International, from the jointly registered PMA-ILWU work force, shall submit a list of its steady men and effective date of their steady employment to the Pacific Maritime Association. The registered men shown on the list on the date of their employment in such status then become the responsibility of the nonmember employer insofar as pay guarantees are concerned and insofar as work opportunity is concerned for the term of the PCL & CD, i.e., to July

1, 1973. Such men shall be considered as not available to member companies and shall not be dispatched to member companies during the term of the contract. Such men shall not be eligible for payments under the PMA-ILWU Pay Guarantee Plan for the term of the Agreement and their paid hours shall not be included in computing "80% of the average paid hours" in the local as referred to in paragraph 3.2 of the Pay Guarantee Plan.

The nonmember employer of such steady men will not be assessed the determined contribution rate for the Pay Guarantee Plan for its steady employees. However, said assessment will be payable as it applies to men employed on a casual basis by a nonmember. Nonmembers desiring to sign Nonmember Participating Agreement for Welfare, Pension, and Vacations and who comply fully with PMA-ILWU contract provisions in regard to use of joint dispatching halls, Section 8.13, and the vacation plans, Section 7.43 may do so provided they comply with the foregoing provisions in regard to steady men and the Pay Guarantee Plan. Failure to comply shall automatically cancel the Nonmember Participating Agreements for that nonmember company and their steady men will not have future hours counted for fringe benefit plans. Further, there shall be no further dispatch of extra men to that nonmember during the time of the contract and none of the identified steady men of that nonmember shall be eligible for dispatch for the term of the Agreement.

- Nonmembers who do not employ steady men shall be covered under nonmember participating agreements if they so desire provided,
  - (a) All orders for men, units of men, or gangs are placed through the PMA allocation system and such men, units or gangs are dispatched in proper allocation sequence or ordered by PMA allocator. Failure of the nonmember employer or of the joint dispatchers to comply with this rule shall automatically cancel all nonmember participating agreements for involved

nonmember company and that company shall not be permitted use of the joint dispatching hall or the use of the Central Records Office payroll services for the duration of the contract.

- Should a strike, illegal work stoppage or lockout occur during the term of the Agreement, during which period member companies are not placing orders or the Union is not taking orders in the joint dispatch hall then no nonmember who is signatory to nonmember participating agreements and is using the joint dispatch and the Central Records Office shall be entitled to dispatch of men. If such nonmember works jointly registered men during such a period, all nonmember participating agreements will be cancelled for the term of the Agreement and dispatching hall and Central Records Office utilization will be cancelled during the term of the Agreement. Any hours worked by registered men for such nonmember after such cancellation will not be considered as hours worked under the Agreement and men who work such hours will be disqualified for Pay Guarantee Payments for the term of the Agreement.
- 4. Nonmember companies who do not employ steady men and who wish to sign nonmember participating agreements will be required to sign a nonmember participating agreement for the Pay Guarantee Plan. Hours worked for such nonmember who remains in compliance with the foregoing rules shall be included in calculation of average paid hours under 3.2 of the Pay Guarantee Plan.
- 5. If a strike should occur at the termination of the Agreement, nonmembers signatory to nonmember participating agreements shall not work with jointly registered men during the strike. If they do, then their nonmember signatory agreements will not be reinstated when work is resumed and the hours worked during the strike will not be considered as hours worked under the Agreement.
- PMA member companies shall not serve as payroll agents for nonmember companies for longshoremen, clerks or Walking Bosses/Foremen.

#### EXHIBIT C

DRAFT-February 25, 1972

### ILWU RESPONSE TO PMA SUGGESTED APPROACH TO NON-MEMBER PARTICI-PATING AGREEMENT ISSUE

Solution

In order to solve those basic problems as are defined in PMA's SUGGESTED APPROACH and still permit nonmembers to participate in the various fringe benefit plans and use the joint dispatching halls the following

suggestions are submitted.

1. Any nonmember who has signed nonmember participating agreements and who employs a steady work force by arrangement with an ILWU local or locals or the International from the jointly registered PMA-ILWU work force shall submit a list of its steady men and effective date of their steady employment to the PMA

within 10 days of notice.

The registered men shown on the list in such status then become the responsibility of the nonmember employer insofar as pay guarantees are concerned and insofar as work opportunity is concerned for the term of the PCLCD (Pacific Coast Longshore and Clerk's Document) which expires July 1, 1973. Such men shall be considered as not available to member companies and shall not be dispatched to member companies during the term of the contract except during peak periods of manpower shortage, and then only by mutual agreement of the Joint Port LRC.

Such men shall not be eligible for payments under the PMA-ILWU Pay Guarantee Plan for the term of the Agreement and their paid hours as steady men shall not be included in computing "80% of the average paid hours" in the local as referred to in para. 3.2 of the Pay

Guarantee Plan.

The nonmember employer of such steady men will not be assessed the determined contribution rate for the Pay Guarantee Plan for its steady employees. However said assessment will be payable as it applies to men employed on a casual basis by a nonmember. (Define casual basis

-week by week?)

Nonmembers desiring to sign Nonmember Participating Agreement for Welfare, Pension and Vacations and who comply fully with PMA-ILWU contract provisions in regard to use of joint dispatching halls, Sec. 8.13, and the vacation plans, Sec. 7.43, 7.44, may do so provided they comply with the foregoing provisions in regard to steady men and the Pay Guarantee Plan. Failure to comply shall automatically cancel the Nonmember Participating Agreements for that nonmember company and their steady men will not have future hours counted for fringe benefit plans. Further, there shall be no further dispatch of extra men to that nonmember during the time of the contract and none of the identified steady men of that nonmember shall be eligible for dispatch for the term of the Agreement unless they shall return to the dispatch hall within 7 days of such cancellation.

2. Nonmembers who do not employ steady men shall be covered under nonmember participating agreements

if they so desire, provided,

(a) All orders for men, units of men or gangs are placed through the PMA allocation system where such procedure is now in effect, and such men, units or gangs are dispatched in accordance with section 8.13. Deliberate violation by the nonmember employer or by the joint dispatchers of this rule shall automatically cancel all nonmember participating agreements for involved nonmember company, and that company shall not be permitted use of the joint dispatching hall or the use of the Central Records Office payroll services for the duration of the contract.

3. Should a strike, illegal work stoppage or lockout occur during the term of the Agreement during which period member companies are not placing orders or the Union refuses dispatch from the joint dispatch hall, then no nonmember who is signatory to nonmember participating agreements and is using the joint dispatch and

the Central Records Office shall be entitled to dispatch of men.

If such nonmember works jointly registered men during such a period, all that nonmember's participating agreements will be cancelled for the term of the Agreement, and dispatching hall and Central Records Office utilization will be cancelled during the term of the Agreement. Any hours worked by registered men for such nonmember after such cancellation will not be considered as hours worked under the Agreement, and men who work such hours will be disqualified for Pay Guarantee Payments for the term of the Agreement.

4. Nonmember companies who do not employ steady men and who wish to sign nonmember participating agreements will be required to sign a nonmember participating agreement for the Pay Guarantee Plan. Hours worked for such nonmember who remains in compliance with the foregoing rules shall be included in calculation of average paid hours under 3.2 of the Pay Guarantee

Plan.

5. If a strike should occur at the termination of the Agreement, nonmembers signatory to nonmember participating agreements shall not work with jointly registered men during the strike. If they do, except under lawful order, then their nonmember signatory agreements will not be reinstated when work is resumed, and the hours worked during the strike will not be considered as hours worked under the Agreement, except that such reinstatement shall be subject to negotiations by the parties.

6. PMA member companies shall not serve as payroll agents for nonmember companies for longshoremen, clerks

or walking bosses/foremen.

7. PMA member companies shall be allowed to steve-dore, husband, or otherwise act as agents for nonmember vessel when all cargo handling operations are performed by the ILWU-PMA work force. Nonmember vessels who perform cargo-handling operations with a non-ILWU-PMA workforce shall not be stevedored, husbanded, or serviced in any manner by a PMA member or the ILWU-PMA workforce, unless:

(a) The nonmember vessel shall pay to the JPLRC the full cost of the joint dispatch hall incurred for dispatch of men to such nonmember vessel; and

(b) An additional tax shall be paid on cargo tonnage handled by any non-ILWU-PMA workforce, and use of such tax monies to be determined by the Joint Coast

Labor Relations Committee.

8. Nonmember companies who have signed nonmember participating agreements and non-members who desire to sign such nonmember agreements, and are performing cargo-handling operations shall be allowed to continue such cargo handling operations.

#### EXHIBIT D

#### SUPPLEMENTAL MEMORANDUM OF UNDERSTANDING

The "Memorandum of Understanding" between the Parties dated February 10, 1972 spells out in Item (D) of "General Provisions Applicable to The Pacific Coast Longshore and Clerks Agreement" a listing of eleven (11) items to be resolved by further negotiation, mediation or arbitration.

This "Supplemental Memorandum of Understanding" is considered as the resolution to Item 9 (a) under the

aforementioned Item (D).

The Parties agree that a new form of supplementary agreement covering nonmember employers and their employees will be prepared containing the following provisions.

(1) A definition of a nonmember employer along the following lines:

"A nonmember is a business entity such as a company, corporation, or public port, or port commission, with whom the International Longshoremen's and Warehousemen's Union on behalf of itself or one of its longshore or clerks locals has a separate collective bargaining agreement outside the Pacific Coast Longshore and Clerks Agreement covering work normally considered under the scope, terms, and conditions of the ILWU-PMA Pacific Coast Longshore and Clerks Agreement and utilizing as its work force employees jointly registered by the Parties to the ILWU-PMA Pacific Coast Longshore and Clerks Agreement."

(2) The new supplementary agreement for nonmembers

shall include the following provisions.

(a) Participation in all of the supplemental agreements to the aforesaid agreement such as Welfare, Pension and Pay Guarantee Plans as well as the Vacation Plan provided in the aforesaid agreement, and the use of the joint dispatching halls provided for by the Parties to the aforesaid agreements. In addition, this new supplemental agreement shall provide that nonmember com-

panies signing the new Nonmember Agreement shall participate in the PMA Central Records System and be assessed the same manhour and tonnage dues and payroll assessments to support the various services rendered by the Association on behalf of its members as are Association members.

And further, that any future assessments applicable to members provided for under the By-Laws of the Association shall automatically apply to nonmembers who have signed the Nonmember Participating Agreement.

Nonmembers desiring to sign the new Nonmember Participating Agreement shall not be permitted to select from the aforementioned those parts in which they would like to participate but, rather, they shall participate in all or none. If it be the latter, they will not be eligible for nonmember participation nor will they be eligible for utilizaiton of the PMA-ILWU jointly registered work force.

(3) The new Nonmember Participating Agreement shall

also include provisions as follows.

(a) A nonmember who has signed the Nonmember Participating Agreement and employs a steady work force by arrangement with an ILWU local or locals, or the International, from the jointly registered PMA-ILWU work force, shall submit a list of its steady men and effective date of their steady employment to the Pacific Maritime Association. The registered men shown on the list on the date of their employment in such steady status then become the responsibility of the nonmember employer insofar as Pay Gurantees are concerned. Such men shall be considered as not available to member companies and shall not be dispatched to member companies so long as they remain as steady employees of the nonmember. However, their paid hours shall be included in computing the various tests under the Pay Guarantee Plan in the applicable port or local.

(b) Nonmembers signing the Nonmember Participating Agreement must comply with the provisions of section 8.13 of the PCL & CA. All orders for men, units of men, or gangs shall be placed through the Pacific Maritime Association Allocations System and such men,

units, or gangs shall be dispatched in proper allocation sequence as ordered by the PMA Allocator. Failure of nonmember employer or of the joint dispatcher to comply with this rule shall automatically cancel the Nonmember Participating Agreement for the involved nonmember.

(c) The Nonmember Participating Agreement should also contain a clause to the effect that, should a strike or lockout occur during the term of the Agreement during which period member companies are not placing orders or the Union is not taking orders in the dispatching hall, then no nonmember who is signatory to the Nonmember Participating Agreement shall be entitled to the dispatch of men. If such nonmember works jointly registered men or casuals during each period, the Nonmember Participating Agreement will be cancelled. Any hours worked by registered men or casuals for such nonmember after such cancellation will not be considered as hours worked under the Agreement and men who work such hours will be disqualified for all fringe benefits.

(e) If a strike should occur at the termination of the Agreement, nonmembers signatory to the Nonmember Participating Agreement shall not work with jointly registered men or casuals during the strike. If they do, their Nonmember Signatory Agreements will not be reinstated when work is resumed, and hours worked during the strike will not be considered as hours worked under

the Agreement.

(5) As soon as the Nonmember Participating Agreement form is prepared and agreed to by the Parties, all present nonmember companies signatory to existing nonmember participating agreements will be advised that the Parties have agreed to cancellation of all existing Nonmember Participating Agreements and that those nonmembers signatory thereto will have a thirty (80) day period in which to sign the new Nonmember Participating Agreement. Failure to sign within the stipulated period will preclude prospectively the utilization by nonmembers of any of the PMA-ILWU jointly registered work force and jointly registered men will not be permitted to accept employment with such nonmember companies not signatory to the Agreement unless they choose to accept deregistration and take up new employment.

EXHIBIT E

Draft

March 6, 1972

### SUPPLEMENTAL MEMORANDUM OF UNDERSTANDING

The "Memorandum of Understanding" between the Parties dated February 10, 1972 spells out in Item (D) of "General Provisions Applicable to The Pacific Coast Longshore and Clerks Agreement" a listing of eleven (11) items to be resolved by further negotiation, mediation or arbitration.

This "Supplemental Memorandum of Understanding" is considered as the resolution to Item 9 (a) under the

aforementioned Item (D).

The Parties agree that a new form of Nonmember Participating Agreement covering nonmember employers and their employees will be prepared containing the following provisions.

- (1) A definition of a nonmember employer along the following lines:
- "A nonmember is a business entity such as a company, corporation, or public port, or port commission, with whom the International Longshoremen's and Warehousemen's Union on behalf of itself or one of its longshore or clerks locals has a separate collective bargaining agreement outside the Pacific Coast Longshore and Clerks Agreement covering work under the scope, terms, and conditions of the ILWU-PMA Pacific Coast Longshore and Clerks Agreement and utilizing as its work force employees jointly registered by the Parties to the ILWU-PMA Pacific Coast Longshore and Clerks Agreement."
- (2) The new Nonmember Participating Agreement shall provide for the following:
- (a) The participation in all of the Benefit Plans of the aforesaid ILWU-PMA Agreement such as Welfare, Pension, Vacation, and Pay Guarantee Plans, and the

use of the joint dispatching halls as provided for in the aforesaid ILWU-PMA Agreement.

(b) The participation in the PMA Central Records

System.

(c) The assessment of nonmembers of the same manhour and tonnage dues and payroll assessments to support the various services rendered by PMA as PMA members are assessed. And further, that any future assessments applicable to members provided for under the By-Laws of PMA shall automatically apply to nonmembers who have signed the Nonmember Participating Agreement.

Note: A nonmember who signs the new Nonmember Participating Agreement shall not be permitted to select from the aforementioned those parts in which it would like to participate but, rather, it shall participate in all. A nonmember who does not sign the Nonmember Participation Agreement will not be eligible for utilization of the PMA-ILWU jointly registered work force.

- (3) The new Nonmember Participating Agreement shall also provide for the following:
- (a) A nonmember who has signed the Nonmember Participating Agreement and employs a steady work force by arrangement with an ILWU local or locals, or the International, from the jointly registered PMA-ILWU work force, shall submit a list of its steady men and effective date of their steady employment to the Pacific Maritime Association. Their participation in the Pay Guarantee Plan shall be in accord with the rules governing that Plan.
- (b) Nonmembers signing the Nonmember Participating Agreement must comply with the provisions of section 8.13 of the PCL & CA. All orders for men, units of men, or gangs shall be placed through the Pacific Maritime Association Allocations System and such men, units, or gangs shall be dispatched in proper allocation sequence as ordered by the PMA Allocator. Failure of nonmember employer to comply with this rule shall auto-

matically cancel the Nonmember Participating Agree-

ment for the involved nonmember.

(c) Should a strike or lockout occur that is in violation of section 11.1 of the PCL & CA during the term of the Agreement, no nonmember who is signatory to the Nonmember Participating Agreement shall be entitled to the dispatch of men. If such nonmember works during such period, the Nonmember Participating Agreement will be cancelled. Any hours worked by registered men or casuals for such nonmember after such cancellation will not be considered as hours worked under the Agreement.

(d) If a strike should occur at the termination of the Agreement, nonmembers signatory to the Nonmember Participating Agreement shall not work. If they do, their Nonmember Signatory Agreements will not be reinstated when work is resumed, and hours worked during the strike will not be considered as hours worked under the

Agreement.

(5) As soon as the Nonmember Participating Agreement form is prepared and agreed to by the Parties, all present nonmember companies signatory to existing nonmember participating agreements will be advised that the Parties have agreed to replace all existing Nonmember Participating Agreements thirty (30) days from the date of notification. Such companies will be asked to sign the new Nonmember Participating Agreement and advised that, if they have not done so thirty (30) days from the date of notification, jointly registered men will not be permitted to accept employment with the company until the company signs a Nonmember Participating Agreement.

> INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

Dated: -

PACIFIC MARITIME ASSOCIATION on behalf of its members:

# BEFORE THE FEDERAL MARITIME COMMISSION

[Received Dec. 15, 1972]

Docket No. 72-48

#### AFFIDAVIT OF CURT J. MYERS

CITY AND COUNTY OF SAN FRANCISCO
) 88.
STATE OF CALIFORNIA

Curt J. Myers, being first duly sworn, deposes and says:

I am Treasurer of Pacific Maritime Association and as such am familiar with all dues, assessments and fringe benefit funding. Our Shoreside Division is financed by a combination of man hour dues and tonnage dues. The principal activities of the Division are: Contract negotiation, day to day contract administration including arbitration and legal services, accident prevention and skills training, joint operation of dispatch halls and joint trusteeship of the fringe benefit trust funds.

Members in the Stevedore/Terminal category pay man hour dues on all labor employed under our collective bargaining agreements and in addition they pay tonnage dues on cargo that they actually load to or discharge from nonmember vessels and on any cargo handled on an FIO basis.

Members in the vessel operator category pay tonnage dues on cargo loaded to or discharged from their vessels.

The Port Authorities in the Northwest, according to PMA's classification, are terminal operators and do not load or discharge vessels and hence do not and will not

under the new participation agreement (Supplement No. 4) pay tonnage dues. The one exception is the Port of Longview which is also a stevedore in that it discharges bulk cargo directly from vessels. The Northwest Port Authorities are and have been paying PMA man hour dues on the labor they employ because they use the joint PMA-ILWU dispatch hall. They also pay into the various PMA-ILWU fringe benefit funds in the same manner as PMA members because they operate under the prior nonmember agreements covering participation in those funds.

The Central Records and Pay Office is financed by payroll dues which are levied upon each payroll processed through that facility. All of the Port Authorities in the Northwest avail themselves of this facility except the Ports of Grays Harbor, Olympia, and Port Angeles. These three ports have minimal payroll volume.

Aside from the exception with respect to minimal activity by the Port of Longview, the Northwest Ports contributions now and on implementation of Supplement No. 4 (the new Nonmember Participation Agreement) is the same. The principal difference is that they now participate in the fringe benefit programs under the terms of their own collective bargaining agreement with the ILWU and they participate voluntarily in the PMA man hour dues program and Central Records Payroll program whereas if they sign the new agreement they will have to take the whole package.

/s/ Curt J. Myers
CURT J. MYERS
Treasurer
Pacific Maritime Association

Subscribed and sworn to before me this 13 day of December, 1972.

/s/ E. A. Phillips Notary Public

# BEFORE THE FEDERAL MARITIME COMMISSION [Received Dec. 18, 1972]

Docket No. 72-48

# AFFIDAVIT OF FRED HUNTSINGER

CITY AND COUNTY OF SAN FRANCISCO )
STATE OF CALIFORNIA )

FRED HUNTSINGER, being first duly sworn, deposes and says:

I am a member of the Coast Committee of the International Longshoremen's and Warehousemen's Union (ILWU) and as such actively participated in the negotiations between ILWU and PMA in 1970, 1971 and 1972 resulting in the Memorandum Of Understanding of February 10, 1972 and in Supplement No. 4, the Nonmember Participation Agreement.

Supplement No. 4 (to the Memorandum Of Understanding between ILWU and PMA of February 10, 1972), the ILWU-PMA Nonmember Participation Agreement, was the result of arms-length collective bargaining.

ILWU initially proposed November 16, 1970, that PMA accept all nonmembers into the fringe benefit programs. PMA initially proposed that nonmembers be entirely excluded under any provisions of the agreement or any supplemental agreements. The give and take of collective bargaining finally resulted in the compromise between these opposite positions which is embodied in Supplement No. 4.

The ILWU-PMA joint workforce, the hiring hall machinery, the central payroll system, and the various fringe benefits have been developed jointly by PMA and ILWU after considerable effort over a long period of years.

The participation of nonmembers in such programs is an advantage to ILWU in its negotiations with the non-PMA member employers. While there are some disadvantages in nonmember participants being required by Supplement No. 4 to follow PMA labor policy, there is an overall benefit to ILWU in its dealings with employers to have solidarity among employers on a coastwise basis.

Supplement No. 4 does not restrain or restrict ILWU in negotiating separate contracts with non-PMA member employers. ILWU and PMA have no understanding or agreement as to the terms of ILWU's contracts with nonmember employers or that ILWU must contract with such nonmembers on terms which are equal to or less favorable to such nonmembers than to PMA members. In the past when contracts were bargained with nonmembers which would give them the fringe benefits and use of the joint workforce it was also necessary to have PMA consent to that arrangement.

The ILWU, neither in negotiating its current contracts with the petitioning ports nor in negotiating any future contracts with the ports, considers itself restrained in any way by Supplement No. 4 to the Memorandum of Understanding from negotiating with the ports on any basis that the ports and the ILWU can agree upon under the collective bargaining process.

Neither ILWU nor PMA was motivated in agreeing to Supplement No. 4 by a desire or intent to put the petitioning ports or any employer out of business or to injure them. Nor does the agreement operate in that way. There are men who perform longshore and clerk functions who are not part of the registered ILWU-PMA joint workforce who are available to nonmembers who do not sign the Participation Agreement.

Upon full consideration the ILWU reached the conclusion in the negotiations that having nonmembers participate in some parts of the ILWU-PMA program and not all is a great administrative inconvenience. We also concluded that PMA's position, that if nonmembers have the benefits jointly sponsored by PMA and ILWU they should have obligations which PMA members have, is basically fair.

The items covered by Supplement No. 4 to Memorandum of Understanding are matters which have been traditionally the subject of collective bargaining in the West Coast longshoring industry.

/s/ Fred Huntsinger FRED HUNTSINGER

Subscribed and sworn to before me this 14th day of December, 1972.

/s/ Martin Friedman Notary Public

# BEFORE THE FEDERAL MARITIME COMMISSION

[Received Dec. 18, 1972]

[Caption Omitted]

# MEMORANDUM OF LAW OF HEARING COUNSEL

#### I. INTRODUCTION

A. The Petition of Certain Pacific Northwest Ports

The Commission initiated this proceeding by Order of Investigation served September 6, 1972 in response to a petition filed by eight ports in the Pacific Northwest.1 Petitioners allege the existence of agreements between the Pacific Maritime Association (PMA) a corporation organized and existing under the laws of the State of California consisting of steamship lines, steamship agents, stevedoring companies and marine terminal companies and the International Longshoremen's and Warehousemen's Union (ILWU), an unincorporated association which is the bargaining agent for longshoremen, marine checkers and dock workers who are employed at Pacific Coast ports of the United States. Petitioners contend that the PMA and ILWU have entered into an agreement known as Supplemental Memorandum of Understanding No. 4 (SMU No. 4) dated April 25, 1972, which allegedly supplements a PMA-ILWU master collective bargaining agreement establishing hiring halls which must be utilized by Petitioners to obtain longshore labor.

Petitioners allege that SMU No. 4 is intended to apply only to nonmembers of the PMA and provides among other things that:

 a nonmember of the PMA must become a party to the PMA-ILWU labor agreements if it wishes to employ any member of the joint PMA-ILWU work force;

 a nonmember must conform his separate ILWU contract to the requirements of SMU No. 4;

<sup>&</sup>lt;sup>1</sup> The eight ports are Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, and Tacoma (of the State of Washington) and Portland (of the State of Oregon).

 any nonmember who fails to conform to the manpower allocation and referral system established by the PMA and ILWU is disqualified from employing any member of the joint work force;

4) nonmemebers are subject to assessments, dues, and other obligations imposed on PMA members and must furthermore submit to the labor policies of the PMA as

respects strikes and lockouts.

Petitioners allege that SMU No. 4 and the underlying master collective bargaining agreement are "agreements" within the meaning of section 15 of the Shipping Act, 1916 which should be filed for approval pursuant to that section but have not been filed. Furthermore, it is alleged that the PMA and ILWU have demanded that Petitioners execute the "ILWU-PMA Nonmember Participation Agreement" established by SMU No. 4.

Petitioners allege that SMU No. 4 and the practices contemplated thereby are detrimental to the commerce of the United States, contrary to the public interest, unfair, unjust, discriminatory and unduly prejudicial in violation of sections 15, 16, and 17 of the Shipping Act, 1916 in certain enumerated respects. Specifically, it is

alleged that they:

(1) Would permit the PMA and the ILWU to monopolize, dominate and control the business of moving cargo in foreign and interstate commerce from and to the Petitioners' ports, including the handling and storage of

such cargo while at such ports.

(2) Would force shippers and consignees to deal with nonmembers of the PMA, including the Petitioners' ports, on terms substantially less advantageous than with members of the PMA, thereby enforcing a concerted boycott by shippers and consignees of such nonmembers. The effect of such boycott would be to make it difficult or impossible for nonmembers, including Petitioners' ports, to remain in business.

(3) Would force Petitioners and others similarly situated to join the PMA in order that the latter could control their activities, including dictating the labor policies

of the Petitioners.

(4) Would regulate, dominate and restrain interstate and foreign commerce with respect to moving and storing cargo to be operated and carried out under artificial and noncompetitive conditions.

(5) Would achieve for the PMA an exclusive, prefer-

ential and cooperative working arrangement.

(6) Would permit the PMA and ILWU to control and regulate the marine terminal operators of Petitioners and prevent and destroy competition of the Petitioners with

member companies of the PMA.

Petitioners pray that the Commission enter into an investigation of SMU No. 4 and the practices contemplated thereunder and after hearing find them to be in violation of the Shipping Act, 1916, declare them to be unlawful and void, and order the PMA to cease and desist from the aforesaid violations.

In reply to the petition, the PMA generally denies all but a few unessential allegations contained therein. Furthermore, the PMA asserts that it does not fix or regulate transportation rates, publish tariffs, etc. but exists solely to represent its members in collective bargaining negotiations, administer and implement collective bargaining agreements between its members and the ILWU and other maritime unions, and to establish labor policies consistent with such labor activities. Wherefore, it is asserted that the PMA is not an "other person" within the meaning of section 1 of the Shipping Act, 1916. Furthermore, it is asserted by the PMA that the ILWU, one of the two contracting parties to the agreements in issue, is not an "other person" within the meaning of the Act nor is otherwise covered by the Act, and that consequently neither the master PWA-ILWU agreement nor the SMU No. 4 is subject to submission, review, and/or approval by the Commission pursuant to the Act. Similarly, the ILWU has moved the Commission to dismiss the petition an the grounds that the ILWU is not subject to the jurisdiction of the Federal Maritime Commission nor is the SMU No. 4 which is a collective bargaining contract.

On October 19, 1972, in response to a petition filed by Hearing Counsel the Commission issued its First Supplemental Order Severing Jurisdictional Issues. In this Order the Commission severed the issue of the Commission's jurisdiction under section 15 over the subject agreements for expeditious determination by the Commission and further set down for determination whether any labor policy considerations would operate to exempt the practices resulting from these agreements from the provisions of sections 16 and 17 of the Shipping Act, 1916, and whether these agreements, if found subject to section 15, should be approved, disapproved, or modified pursuant to that section.

# B. Pending Antitrust Cases in the Courts

There are pending three proceedings in the courts involving essentially the same parties and subject matter as are before the Commission. In Port of Anacortes et al, v. PMA and ILWU, Civil No. 72-618, U.S. District Court for the District of Oregon, the eight Pacific Northwest ports allege that defendants PMA and ILWU have combined and conspired to restrain trade in violation of antitrust laws by performing acts and adopting programs designed to monopolize and control the movement of cargo in foreign and interstate commerce from and to Pacific Northwest Coast ports, including the handling of such cargo while at such ports; compel shippers and consignees to deal solely with members of the PMA to the exclusion of plaintiffs by certain means; eliminate plaintiffs as non-PMA member competitors or in the alternative to force plaintiffs to join the PMA; fix prices and terms for services rendered by plaintiffs and enable PMA to collect additional funds as dues or in lieu thereof; and regulate and restrain interstate and foreign commerce in moving and storing cargo, and otherwise cause the businesses of moving and storing cargo to be operated so as to eliminate competition in said business.

Plaintiffs further allege that over the past several years defendants have engaged in an attempt to compel plaintiffs to become PMA members and that the PMA has threatened to exclude non-PMA members including the plaintiffs ports from the use they now enjoy of PMA- ILWU hiring halls. The unlawful activity of defendants PMA and ILWU, it is alleged, is directly motivated by their desires to compel plaintiffs ports to become PMA members, or, in the alternative, to prevent or substantially impair the ability of plaintiffs ports to compete directly with PMA members in cargo handling in Pacific

Northwest Coast ports.

The plaintiff ports specifically refer to the SMU No. 4 and describe its effects in the same manner as in their petition to the Commission. Plaintiffs moreover allege that defendants have announced their intention to enforce the provisions of SMU No. 4 against plaintiffs and to deny access to the joint work force as to any of the plaintiffs who fail to adhere to the conditions and requirements of said memorandum and that unless defendants are immediately restrained, plaintiffs will suffer immediate and irreparable damage to their business and prop-

Plaintiffs also allege in a separate different count that the SMU No. 4 and underlying agreement establishing hiring halls are subject to section 15 of the Shipping Act, 1916 and are therefore unlawful until approved by the Federal Maritime Commission and ask the court to enjoin defendants from implementing the provisions of the SMU No. 4 until the Commission has had adequate time

to carry out its powers.2

The plaintiffs also pray the court for a declaratory judgment and decree against defendants restraining defendants from implementing the SMU No. 4 or from denying plaintiffs access to the joint work force and further ask the court to declare that the SMU No. 4 is subject to section 15 of the Shipping Act, 1916, and for other relief pendente lite.3

In a final count in their complaint before the court, plaintiffs allege that they are precluded from entering into SMU No. 4 by applicable laws of the States of Oregon and Washington which forbid the ports from delegating control over labor policies.

<sup>\*</sup> The Commission moved for leave to intervene in the Anacortes case and furthermore asked the Court to stay proceedings pending Commission determination of the status of the alleged agreements under the Shipping Act, 1916. By order dated October 3, 1972 inter-

In the second case before the courts, The Port of Long-view v. PMA and ILWU, Civil No. 72-626, U.S. District Court for the District of Oregon, the plaintiff port alleges that defendants have entered into a number of agreements including that of April 25, 1972 (SMU No. 4) and have conspired to restrain interstate and foreign commerce by monopolizing and controlling the business of moving cargo in foreign and domestic commerce from and to West Coast ports, eliminating plaintiff port as a non-PMA member competitor, forcing plaintiff and others to join the PMA, diverting cargo to PMA members, imposing the terms and conditions of the PMA-ILWU agreement upon no parties thereto, and fixing prices for services rendered by plaintiff.

Plaintiff alleges the existence of an additional agreement between the PMA and Local 92 of the ILWU affecting the hiring of walking bosses and furthermore asserts that as a municipal corporation it is forbidden by the law of the State of Washington from delegating its authority with respect to labor policies. Plaintiff asks the court to enjoin defendants from implementing and enforcing the various agreements and from engaging in the allegedly unlawful conspiracy, combination and conduct in violation of the antitrust laws and for other re-

lief.

In the third case, Port of Seattle v. PMA et al., Civil No. 214-72C2, U.S. District Court for the Western District of Washington at Seattle, plaintiff Port of Seattle alleges that defendants PMA and ILWU have combined and conspired to monopolize, dominate, and control commerce to and from West Coast ports, and have utilized their monopoly power and domination of the market to force plaintiff and others into joining the PMA and to remove the Port of Seattle and others from competition. Plaintiff

alleges that from and after December 23, 1970, defendant PMA has engaged in an attempt to compel the Port of Seattle to become a PMA member and has threatened to exclude non-PMA members including the Port of Seattle from the use they now enjoy of PMA-ILWU hiring halls and participation in PMA-ILWU benefit plans, with the objective of compelling the Port of Seattle to become a PMA member or, in the alternative, to remove the Port from competition with PMA members. Moreover, it is alleged that defendants entered into an agreement on February 10, 1972 known as Section 1.55 of Memorandum of Understanding which would require that containers originating at or destined for delivery to a non-PMA member facility employing ILWU labor be stuffed or unstuffed by ILWU labor employed by an employer who is signatory to the PMA-ILWU collective bargaining agreements. Thus, it is alleged, containers destined to Port warehouses must undergo a completely useless and wasteful process whereas containers destined for warehouses orerated by PMA members would be delivered directly to the PMA-member warehouse without any requirement for unstuffing at a container freight station (CFS). Plaintiff alleges that the stated purpose of defendants in adopting this particular provision was to put the Port of Seattle out of business and that defendants have refused to release containers from container yards unless and until such containers are first delivered to CFS transit sheds for unstuffing by employees of PMA members.

Plaintiff alleges violations of sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act and seeks an injunction permanently restraining defendants from implementing and enforcing their allegedly unlawful agreements plus treble damages and costs.

vention was granted and the proceedings were stayed without prejudice.

<sup>&</sup>lt;sup>4</sup> The Commission was granted interpretion in the Longview case on November 28, 1972. We are advised that the Court has also stayed that proceeding.

s A temporary restraining order was entered against defendants in this case on May 2, 1972. This was continued on May 22, 1972. On or about August 7, 1972, the Port of Seattle moved for a preliminary injunction against implementation of the PMA-ILWU Nonmember Participation Agreement. After the PMA and ILWU withdrew implementation and agreed to give 30-days notice to the Port before implementation, the motion was continued indefinitely. We are advised that the case has also been stayed on the merits.

### C. Pending Proceeding Before the National Labor Relations Board

Still additional proceedings involving PMA and ILWU agreements are before the National Labor Relations Board. In International Longshoremen's and Warehousemen's Union, Local 13, et al. and Pacific Maritime Association and California Cartage Company, Inc. et al., Case Nos. 21-CC-1326, 21-CE-103, 109, 111, 112 and 116. Administrative Judge James T. Rasbury issued a Decision on October 19, 1972 in which he found that certain agreements relating to Container Freight Stations (which include section 1.55 referred to in the Seattle case above) were in violation of section 8(e) of the National Labor Relations Act and that respondent Unions had furthermore violated section 8(b) (4) (i) and (ii) (B) of that Act. The basis for these findings were the facts that by agreement with the ILWU respondent PMA had refused to do business with certain companies that were not employing ILWU labor for the stuffing and stripping of containers and that ILWU was inducing employees of the PMA to refuse to handle containers stuffed by those companies. Respondents were ordered to cease and desist from implementing the unlawful agreements and from carrying out the unlawful practices described. The PMA was furthermore ordered to publish a notice which among other things stated that the PMA would not give effect to any provision of the PMA-ILWU CFS Supplemental Agreement which restricted handling of containers by employees of companies that are not members of the PMA.

# II. LABOR-RELATED CASES BEFORE THE COMMISSION

This is the fourth case before the Commission involving the difficult question of determining the scope of the Commission's jurisdiction under the Shipping Act, 1916 with regard to labor-related agreements. The difficulty in this area stems from the fact that the issue is essentially one of line drawing and one which involves

reconciliation of conflicting statutory policies.

In the first of these cases, Volkswagenwerk v. Federal Maritime Commission, et al., 390 U.S. 261 (1968) the Supreme Court held that an agreement among persons subject to the Shipping Act to assess themselves for the purpose of contributing to a mechanization fund established under the collective bargaining agreement with the union must be filed with the Commission for approval under section 15 of the Shipping Act, 1916. The union was not a party to the assessment agreement in the Volkswagen case, the agreement being formulated and executed exclusively by the Pacific Maritime Association. It was therefore only indirectly related to the collective bargaining agreement between the PMA and ILWU. The Court emphasized that neither the agreement creating the PMA nor the collective bargaining agreement between the PMA and ILWU were in issue, stating:

"those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board . . ." 390 U.S. at p. 278.

Unfortunately as Mr. Justice Harlan pointed out in Volkswagen, the Court's reliance on a nebulous "area of concern" standard was unfortunate since it provided little guidant to signatories to agreements as to the status of their agreements under labor, antitrust, or shipping law. 390 U.S. at p. 286. Mr. Justice Harlan recognized, however, that the problem of reconciliation of the various statutory policies was one in which Congress itself had provided very little guidance. 390 U.S. at p. 284.

<sup>\*</sup>This Decision will become the decision of the NLRB unless exceptions are filed as provided in sections 102.46 and 102.48 of the NLRB's Rules and Regulations. Earlier, on May 16, 1972, the NLRB had obtained a temporary injunction against the PMA and ILWU in the case of Wilford W. Johansen, Regional Director v. ILWU Local 10 et al., Civil No. 72-892-JWC, U.S. District Court Central District of California.

In the second case, United Stevedoring Corp. v. Boston Shipping Association (BSA), FMC Docket No. 70-3, Report on Remand from the United States Court of Appeals for the Fifth Circuit, August 25, 1972, the Commission had under consideration three labor-related agreements, viz., the incorporation papers and bylaws establishing the BSA, an agreement providing for hiring and allocation of labor among stevedores, and an agreement among stevedores establishing certain "first call-recall" assignment rights as to labor gangs. The Commission found that all three agreements were entitled to so-called labor exemption and therefore held that they need not be filed for approval under section 15 of the Act. Moreover, the Commission enunciated certain criteria to be used in determining whether a particular agreement fell within the scope of the labor exemption. We discuss the Commission's decision in some detail in the next section.

The third case is New York Shipping Association-NYSA-ILA Man-Hour/Tonnage Method of Assessment; Possible Violation of Sections 15, 16, and 17, Shipping Act, 1916, F.M.C. Docket No. 72-51, Order to Show Cause served September 14, 1972. That case involves an agreement entered into between the NYSA and the ILA levying an assessment on carriers and stevedores for the purpose of funding certain fringe benefits established elsewhere in the collective bargaining agreement. Although the assessment agreement in that case is the successor to a previous agreement approved with modifications by the Commission in Agreement No. T-2336-New York Shipping Association Cooperative Working Arrangement, F.M.C. Docket No. 69-57, June 14, 1972, 13 Pike & Fisher S.R.R. 73, it is contended that the agreement is entitled to the labor exemption on the grounds that the agreement is the result of collective bargaining with the ILA.

#### III. THE CRITERIA ESTABLISHED BY THE COM-MISSION IN UNITED STEVEDORING CORP. v. BOSTON SHIPPING ASSOCIATION

The scope of the so-called labor exemption from antitrust and regulatory law has been determined by the Commission recently in *United Stevedoring Corp.* v. Boston Shipping Association (BSA), cited above. In that case which involved three labor-related agreements the Commission applied doctrines of law which had evolved through the courts in a number of cases arising under the antitrust laws. These agreements comprised first, the basic organic agreements establishing a multiemployer bargaining unit, second, an agreement as to allocation of labor gangs among stevedores, and third, an agreement as to the right of stevedores to exercise assignment and reassignment rights over labor gangs.

The Commission found that all three agreements fell within the scope of the labor exemption, the first agreement being primarily a collective bargaining unit, the second, nothing more than hiring by employers of employees, and the third, consisting of matter which had been the subject of good-faith bargaining having only limited competitive effects and without impact on entities outside the collective bargaining group. Multilith

Report, pp. 10, 11.

In arriving at its decision in the BSA case, the Commission determined several issues which have been raised by respondents in this proceeding. Thus, the Commission held that the BSA as an entity is subject to FMC jurisdiction although its members and not the association itself actually perform transportation services on the principal that the association acts as agent of its members as does a conference, citing Far East Conference v. F.M.C., 337 F.2d 146 (1964). Multilith Report, p. 4. This principle holds even if, as the Commission stated, "some members of the BSA may not be subject to our jurisdiction." Multilith Report, p. 4. Similarly, FMC jurisdiction would attach to the PMA as an entity. Otherwise, as the Commission observed, persons who are clearly subject to FMC jurisdiction could band together in the

form of an association and engage in matters of Shipping Act concern with regulatory impunity. Multilith Report, p. 4. Such a result, as the Commission stated, "would frustrate the entire purpose of the Act" and the Commission "will not tolerate such a device to blunt our regulation of this nation's maritime industry." Multilith Report, p. 4. We do not contend that the members of the PMA have established that association in order to evade regulation, only that the association as an entity apart from its members is subject to the Shipping Act.

The Commission discussed at some length the problem concerning accommodation of the Shipping Act with labor act policies in the BSA case. The Commission recognized the judicially-sanctioned doctrine whereby the fruits of collective bargaining are generally exempted from application of antitrust laws. On the other hand the Commission specifically acknowledged its responsibilities according to the Volkswagen case in which the Supreme Court first determined that labor-related assessment agreements are subject to section 15 of the Act. As the Commission stated:

"... [W]e must adhere to the guidelines set forth in Volkswagenwerk Aktiengesellschaft v. F.M.C., 390 U.S. 261 (1968) in which we were reproached for taking 'an extremely narrow view of a statute that uses expansive language'."

The Commission cited the three leading cases in this particular area of law, namely, Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers, 325 U.S. 797 (1945), United Mine Workers v. Pennington, 381 U.S. 657 (1965), and Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965). In the first two cases the Supreme Court held that the agreements between management and the Union were not exempt from the antitrust laws since the Court had found concerted effort by management and the Union to eliminate

competition in the industries involved. In the latter case, the Court found no conspiracy between employers and the Union to eliminate competition but rather a legitimate effort on the part of the Union to obtain favorable terms from a particular employer. Multilith Report, pp. 6, 7.

Following discussion of these cases the Commission enunciated several principles. First, that the question of exemption of labor-related matters from application of the antitrust laws is analogous to that involving exemption from the shipping laws. Multilith Report, p. 6. Hence the doctrines which have evolved in the antitrust cases can be applied in the instant case.

Second, as the Commission stated:

"[t]he mere fact that a collective bargaining agreement involves a mandatory subject of bargaining does not ipso facto exempt the agreement from the antitrust laws." Multilith Report, p. 7.

As the Supreme Court stated in the Pennington case, cited above:

"This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining . . . . But there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other law." 381 U.S. at pp. 664, 65.

Third, since even the matters which are mandatory subjects of collective bargaining under the labor laws are not necessarily exempt from antitrust or regulatory laws, the mere presence of matters in collective bargaining agreements confers no immunity from antitrust or regulatory law. As the Commission stated:

"The mere fact, therefore, that a certain agreement is part of a collective bargaining agreement does not

<sup>&</sup>lt;sup>7</sup> The Commission did recognize that the agreement in the *Volkswagen* case was not embodied in the collective bargaining agreement but was in implementation of a provision therein. Multilith Report, p. 5, n. 6.

automatically immunize that agreement from the antitrust laws." Multilith Report, p. 11.

Elsewhere the Commission stated:

"We cannot, however, subscribe to the view that collective bargaining agreements be granted a blanket exemption from the Shipping Act." Multilith Report, p. 9.

Fourth, in determining whether labor-related agreements are subject to the provisions of the Shipping Act, 1916, the Commission will proceed on an ad hoc case-bycase basis. In making such determinations, furthermore, the Commission will consider the criteria evolved in the courts as guidelines or "rules or thumb" for each factual situation. Thus, the Commission will consider such factors as whether the agreement was the result of good-faith collective bargaining, the subject matter was a mandatory subject of bargaining, whether the Union was acting alone rather than at the behest of or in combination with nonlabor groups, and whether the result of the bargaining imposes terms on entities outside of the collective bargaining group. Furthermore, the Commission will examine whether the agreement is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act and whether the impact of the agreement upon business is significant or indirect and remote. Finally, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement. Multilith Report, p. 8.

Moreover, the Commission held that it would give consideration to labor policy on an ad hoc basis with respect to possible violations of sections 16 and 17 of the Shipping Act.

IV. PMA-ILWU AGREEMENTS WHICH APPLY TO NON-PMA MEMBERS ARE NOT ENTITLED TO A LABOR EXEMPTION BECAUSE OF THE NATIONAL POLICY ENCOURAGING COLLECTIVE BARGAINING. HOWEVER SUCH ARGEEMENTS APPEAR TO RAISE SUBSTANTIAL ANTITRUST AND LABOR RATHER THAN SHIPPING ACT PROBLEMS.

It seems clear, we submit, on the basis of the Commission's decision in the BSA case and the cases cited therein that the agreement or agreements between PMA and the ILWU embodied in the SMU No. 4, section 1.55 of the Memorandum of Understanding regarding container stuffing and stripping, and related agreements alleged in the various complaints filed in the courts, are not entitled to the so-called labor exemption from antitrust or regulatory law. Assuming as we must for purposes of determining jurisdiction that all the allegations by the Pacific Northwest ports are true in fact, it appears that the PMA and ILWU are simply attempting to coerce the outside ports into becoming members of the PMA by forcing onto these ports the same terms and conditions of employment which were collectively bargained between the PMA and ILWU. Indeed, on its face, the SMU No. 4 establishes an "ILWU-PMA Nonmember Participation Agreement" and states among other things that:

"A business entity not a member of PMA must participate in this ILWU-PMA Nonmember Participation Agreement if it uses men in the joint work force. The nonmember participant's separate ILWU contract must conform with the provisions hereof, and the provisions of the PCLCA . . . [the underlying collective bargaining agreement between PMA and ILWU] . . . governing the selection of men for inclusion in the joint work force." (See Appendix, SMU No. 4, paragraphs 1 and 2).

There are allegations, as we have seen, that the PMA has for some time been attempting to bring non-member

<sup>&</sup>lt;sup>8</sup> Even Mr. Justice Douglas who dissented in *Volkswagen* from the majority opinion that the FMC had jurisdiction over the assessment agreement in question stated:

<sup>&</sup>quot;To be sure, the parties to a collective bargaining pact must frame their agreement to fit within the standards of the antitrust laws or any other governing statutes." 390 U.S. at p. 312.

PMA ports into the association and that together with the ILWU and PMA has conspired to accomplish this objective and eliminate outside competition. It may be that if this alleged conspiracy were to succeed the Pacific Northwest ports who were previously free to contract with the ILWU on an individual port-by-port basis free and clear of PMA policies would suffer particular competitive harm. However, the particular activity which has given rise to the various complaints and petition, we submit, stripped to its essence is a conspiracy or combination between a group of employers and a union to force PMA membership on outsiders or impose terms and conditions of their collective bargaining agreement upon parties outside the collective bargaining unit with the objective of monopolizing and controlling the entire industry on the West Coast.

This type of activity involving a conspiracy or combination between a group of employers and a union is one which courts have traditionally dealt with in antitrust cases. In such cases the Supreme Court has held time and again that the parties to the conspiracy are not protected by the national policy encouraging collective bargaining if they combine to restrain trade. Typically, the

Supreme Court has held:

"But when the unions particiapted with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts." Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers, cited above, at p. 809.

Furthermore, the Supreme Court has made clear that unions lose their protection from the reach of antitrust laws if they enter into a combination with nonlabor i.e., employer groups. In this regard the Court has stated that the unions must act:

"in pursuit of their own labor union policies and not at the behest of or in combination with nonlabor groups, . . ." Amalgamated Meat Cutters v. Jewel Tea Co., cited above at pp. 689, 690. See also Intercontinental Container Transport Corp. v. New York Shipping Association, 426 F.2d 884, 886, 87 (2d Cir. 1970).

There is no protection from the antitrust laws merely because a particular combination or conspiracy to restrain trade was the subject of collective bargaining and actually became incorporated into a collective bargaining agreement. United Stevedoring Corp. v. Boston Shipping Association, cited above, at p. 11; United Mine Workers

v. Pennington, cited above, at pp. 664, 65.

The alleged agreements which are the subject of this proceeding bear a striking resemblance to that found unlawful under the antitrust laws by the Supreme Court in the case of *United Mine Workers* v. *Pennington*, cited above. In that case a group of large employers in the mining industry had agreed with the union to impose certain labor standards on smaller employers outside of the immediate bargaining group. It was contended that this scheme was intended to eliminate from competition the smaller mine operators who allegedly could not withstand the costs of the particular terms and conditions of employment which would be forced upon them. The Court held:

"But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry." 381 U.S. at pp. 665-66.

The Court held that parties to a collective bargaining unit could not by agreement attempt to impose labor standards outside of that unit or settle these matters for an entire industry. Thus, the Court stated:

"... [T]he policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit." 381 U.S. at p. 668.

"But there is nothing in the labor policy indicating that the union and employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry." 381 U.S. at p. 666.

"Thus the relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws." 381 U.S. at p. 669.

In addition to the harmful effects of this type of agreement on employers throughout an industry, the Court found such agreements unlawful because of their detrimental effect on labor policy regarding a union's freedom to bargain. The Court stated in this regard:

"The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being straitjacketed by some prior agreement with the favored employers." 381 U.S. at p. 666.

"From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect . . . For the salient characteristic of such agreements is that the union surrenders its

freedom of action with respect to its bargaining policy. . . . After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to anti-trust policy." 381 U.S. at p. 668.

On the basis of the *Pennington* and other cases cited, we submit, the SMU No. 4 and related agreements between the PMA and ILWU are not exempted from the antitrust laws because of the national policy encouraging collective bargaining. Furthermore, we submit, the agreements essentially concern an attempt by one employer group, the PMA, in combination with a union, the ILWU, to impose terms and conditions of employment on outside employer groups, i.e. to impose uniform standards on an entire industry. This type of agreement, as we have seen, has traditionally been dealt with by the courts in antitrust cases in which antitrust and labor policies are involved.

We recognize that the alleged agreements if implemented might well have anticompetitive effects on the business of the ports in the Pacific Northwest as alleged and that consequently the agreements are not without Shipping Act implications. Since one of the parties to the agreement, the PMA, is a maritime association it is natural to expect that the effects of the agreement will ultimately be felt in the shipping industry. However, we submit, in their essentials the agreements involve antitrust and related labor policies and require determining whether parties engaged in collective bargaining have exceeded the scope of legitimate bargaining. In the BSA case the Commission held that labor-related cases would be decided on an individual ad hoc basis in consideration of a number of factors and that the Commission would balance these factors in an effort to determine whether Shipping Act problems were so significant as to warrant the exercise of the Commission's jurisdiction in laborrelated areas. In this case, we submit, there are so many factors which relate to antitrust and labor laws and policies rather than the Shipping Act that the Commission ought to leave these matters to the courts and the

NLRB who are equipped to cope with them.

Should these various collective bargaining agreements be found lawful by the courts despite the Pennington case, we submit, and the parties carry out specific practices which may unduly prejudice the ports or cargo in violation of section 16, or may constitute unreasonable practices under section 17 of the Shipping Act, Shipping Act concern may become substantial and the obligations of members of the PMA under the Shipping Act (and also the ILWU as "any other person" under section 16) may have to be determined by the Commission. Such a case might involve accommodation between Shipping Act and labor policies but the Commission has held that the mere execution of a collective bargaining agreement cannot override the clear requirements of the Shipping Act. See South Atlantic and Caribbean Line, Inc.—Order to Show Cause, 12 F.M.C. 237, 241 (1969); Burlington Truck Lines, Inc. et al. v. United States, 371 U.S. 156, 172 (1962); Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders, 332 I.C.C. 301, 383 (1964).

Regarding the final issue set down in the Commission's First Supplemental Order, i.e. approvability of the subject agreements assuming they are found subject to section 15, we submit, such questions require the development of a full and complete evidentiary record in which their specific effects can be thoroughly explored.

# V. CONCLUSIONS

This proceeding was initiated by the Commission in response to a petition filed by eight Pacific Northwest ports who alleged the existence of agreements between respondents PMA and ILWU by which respondents were allegedly attempting to force the ports into becoming members of the PMA or accepting the terms and conditions of the PMA-ILWU collective bargaining agreements. It is alleged that these agreements would permit the PMA and ILWU to monopolize, dominate, and control the business of moving cargo through petitioners' ports with harmful effects on the ports. It is further alleged that these agreements have not been filed for approval with the Commission as required by section 15 of the Shipping Act, 1916.

The alleged agreements are also the subject of three antitrust cases now before U.S. District Courts in Oregon and Washington. Furthermore, PMA-ILWU agreements relating to container stuffing and stripping are involved in a proceeding before the National Labor Relations Board in which an Administrative Judge has found such agreement to be in violation of the National Labor Relations Act.

The Commission has had for consideration four cases including this one which involve the difficult question of determining the scope of the Commission's jurisdiction with regard to labor related agreements. In the most recently decided case, United Stevedoring Corp. v. Boston Shipping Association (BSA) the Commission held that three labor-related agreements need not be filed for approval under section 15. In its decision the Commission enunciated certain criteria to be used in determining whether an agreement is protected by the so-called labor exemption and furthermore stated that it would decide each labor-related case on an individual ad hoc basis after weighing a number of factors which would indicate whether the agreement raised essentially labor rather than Shipping Act problems.

According to the governing principles of law as evolved in the courts parties to collective bargaining agreements do not enjoy an exemption from antitrust laws if they engage in conspiracies or combine to restrain trade in any particular industry. An attempt by one group of employers in combination with a union to force terms and conditions of employment on other employers in an industry outside of the immediate collective bargaining unit is specifically condemned under the antitrust laws as shown by United Mine Workers v. Pennington. Not only is this type of conspiracy condemned because of the harm resulting to other employers but because of the harm to unions which lose their freedom to bargain with other

employers.

Although not without Shipping Act implications since they occur in the shipping industry, the subject agreements bear a striking resemblance to that type of agreement condemned under the antitrust laws in *Pennington*. In their essentials the subject agreements involve antitrust and related labor policies and require a determination whether parties engaged in collective bargaining have exceeded the scope of legitimate bargaining. For these reasons, we submit, these matters ought to be left to the courts and the NLRB who are equipped to cope with them.

If ultimately the agreements are found lawful by the courts despite Pennington, the actual practices flowing in implementation thereof may raise substantial Shipping Act problems under section 16 or 17 of the Act. If so, we submit, the Commission would have to determine the obligations of the parties under the Act with due consideration to labor policies, but as the Commission has held, the mere execution of a collective bargaining agreement cannot override the clear requirements of the Shipping Act.

The question of approvability of the agreements assuming they are found subject to section 15 cannot be answered absent a fully developed evidentiary record ex-

ploring their specific effects.

Respectfully submitted,

DONALD J. BRUNNER,
Director
Bureau of Hearing Counsel
NORMAN D. KLINE
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Washington, D.C. December 15, 1972

# BEFORE THE FEDERAL MARITIME COMMISSION

[Received Dec. 19, 1972]

[Caption Omitted]

MEMORANDUM OF LAW ON BEHALF OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, INTERVENOR

#### INTRODUCTION

International Longshoremen's Association, AFL-CIO (ILA), an intervenor in this proceeding, asks the Commission not to exercise jurisdiction over the collective bargaining agreement between International Longshoremen's and Warehousemen's Union (ILWU) and the Pacific Maritime Association (PMA) because such collectively bargained agreement does not fall within the scope of the Commission's jurisdiction.

ILA adopts the facts set forth by the Respondent,

ILWU.

ILA, although not a party to the agreement between ILWU and PMA, is a party to a collective bargaining agreement with New York Shipping Association, Inc. (NYSA) and assertion of jurisdiction herein would have an effect on Docket No. 72-51. It is the position of the ILA that any interference by the Commission with the agreement between ILWU and PMA would be without the scope of its jurisdiction and an intrusion into collective bargaining. If the Commission should assert jurisdiction merely because one of the parties to the agreement acting alone might be subject to the Shipping Act and therefore subject to the Commission's jurisdiction, such assertion of jurisdiction would violate the right of employees to bargain collectively through representatives of their choice which right is guaranteed under the Labor-Management Relations Act, as amended.

The stevedoring industry has for the past several years been in the throes of a mechanization revolution which has substantially reduced work opportunities in almost every port in the country. It is because of the great changes in the methods of cargo handling and the need to protect the employees in the industry that the unions involved have taken steps to insure the income and fringe benefits of their members.

ILA asks the Commission to dismiss the petition because of lack of jurisdiction over the agreements in-

volved.

#### STATEMENT OF THE CASE

The Petitioners herein are various municipal corporations in the States of Washington and Oregon which own and operate marine terminal facilities. They seek an investigation by this Commission of an Agreement between ILWU and PMA and a Supplemental Memorandum of Understanding #4 which Agreement and Supplemental Memorandum concern themselves with the method of man power allocation and a referral system. The Supplemental Memorandum #4 requires that non-members of PMA must conform to the man power allocation and referral system and further requires them to participate in the obligations of PMA to the employee members of ILWU.

Petitioners claim that Memorandum #4, if implemented, would constitute a violation of Sections 15, 16 and 17 of the Shipping Act of 1916. The Commission has set this matter down for a determination as to jurisdiction prior to any determination as to the question of violation of the Act.

# ARGUMENT

The collective bargaining agreement including the Supplemental Memorandum of Understanding #4 involved herein is an agreement exempt from regulation by the Commission.

In the case of United Stevedoring Corporation v. Boston Shipping Association (F.M.C. Docket No. 70-3, Aug.

25, 1972), this Commission held that the collective bargaining agreement therein involved was exempt from its jurisdiction.

In that case, the Commission recognized the problems of the maritime industry and that its intrusion into collective bargaining might further aggravate these problems. The Commission also took cognizance of the fact that the courts have carved out a labor exemption from the anti-trust laws that such a labor exemption from the Shipping Act did indeed exist.

The lack of jurisdiction is supported by the Supreme Court decision in Volkswagenwerk v. Federal Maritime Comm'n, 390 U.S. 261 (1968). In Volkswagen, the Court reiterated its past holdings that the national labor policy over free collective bargaining is within the exclusive jurisdiction of the National Labor Relations Board (N.L.R.B.).

In his concurring opinion, Mr. Justice Harlan stressed the necessity for exemption for collectively bargained agreements from conflicting regulation both under the anti-trust laws and the Shipping Act. See also United Mine Workers V. Pennington, 381 U.S. 657 (1965); Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); United States v. Hutcheson, 312 U.S. 219 (1941); Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797 (1945); American Federation of Musicians v. Carroll, 391 U.S. 99 (1968); Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959).

ILA was a party in the case of Intercontinental Container Transport Corp. v. New York Shipping Association, 426 F.2d 884 (2d Cir. 1970) which involved an anti-trust law suit against both NYSA and ILA resulting from the collective bargaining agreement between them limiting the use and handling of containers. The Court of Appeals, Second Circuit, held at p. 888 that the container rules were "within the protection of the labor exemption to the anti-trust laws". See Kennedy v. Long Island R. R. Co., 319 F.2d 366 (2d Cir. 1963), cert. denied, 375 U.S. 830 (1963); Burlington Truck Lines v. United States, 371 U.S. 156, 172-173 (1962).

The agreement involved herein is clearly within the protection of the labor exemption to the Shipping Act. Any other determination would frustrate collective bargaining agreements within the maritime industry and would cause further disruption to an industry which has been disrupted by long and costly strikes, contract after contract. Industrial peace in the maritime industry can only be maintained by agreement between the parties involved without any governmental interference. The regulation of collective bargaining agreements as defined by the courts lies exclusively within the jurisdiction of the National Labor Relations Board.

In any event, the ILA and ILWU, both of which are labor organizations, are not subject to the jurisdiction of

the Commission.

They are neither "common carriers by water" nor

are they "other persons subject to" the Act.

Although the Commission may have jurisdiction over the PMA in the instant case or the NYSA, in Docket No. 72-51, any order that it may issue to either of those parties could not be binding on ILWU or ILA.

Certainly, the best that can be accomplished by assertion of jurisdiction by the Commission would be to impair the collective bargaining agreements involved.

Action by the Commission would not only result in detriment to peaceful labor relations but also would be detrimental to our national economy which has already sustained severe blows by the protracted strikes which resulted in the agreements under attack.

The Commission must recognize that the goals of the ILWU and ILA are not to aid any employer group but solely to protect the job opportunities, wages and fringe benefits of the employees whom they represent.

#### CONCLUSION

THE COMMISSION SHOULD FIND THAT IT LACKS JURISDICTION IN THIS MATTER AND THE PETITION SHOULD BE DISMISSED.

Respectfully submitted,

GLEASON & MILLER

By: /s/ Thomas W. Gleason
THOMAS W. GLEASON
Attorneys for International
Longshoremen's Association,
AFL-CIO, Intervenor

THOMAS W. GLEASON
JULIUS MILLER
Of Counsel

Dated: December 14, 1972

# BEFORE THE FEDERAL MARITIME COMMISSION

[Received Jan. 12, 1973]

# Docket No 72-48

# AFFIDAVIT OF B. H. GOODENOUGH

B. H. Goodenough being first duly sworn deposes and says:

I am the Vice-President, Shoreside Labor Relations, Pacific Maritime Association (PMA) where I have been employed for 15 years. As such I am thoroughly familiar with maritime shoreside labor employment on the Pacific Coast and participated actively in the negotiations leading to the February 10, 1972 agreement between PMA and ILWU and the subsequent Supplement No. 4 relating to nonmember participation. I previously submitted an affidavit dated December 14, 1972 in this docket.

The affidavit of the petitioning ports and particularly the one submitted on behalf of the Port of Seattle contain numerous references to the rough minutes of the negotiating sessions in 1971 and early 1972 between the ILWU and the PMA. Included in these references are comments concerning the "Seattle problem" and some references particularly by Mr. Bridges of the ILWU directed toward Seattle as well as references concerning the Container Freight Station (CFS) Supplemental Agreement, Article 1.55 of that agreement, and other references concerning Local 9 vs. Local 19 at the Port of Seattle. A principal purpose of this affidavit is to recite facts which will show that the so-called "Seattle problem", the CFS Supplement, and the dispute relating to Locals 9 and 19 of the ILWU, are themselves interrelated but are not related to the subject of this docket, namely Supplement No. 4, the Nonmember Participation Agreement, and have no bearing whatsoever on that agreement.

The Port of Seattle operates what they refer to as back-up warehouses. These warehouses are used almost exclusively in the storage of inbound (import) cargo under the OCP tariffs of the inbound conferences. The cargo under the OCP system is stored in transit for an average period of 90 to 120 days. (Seattle's "warehousing" operation is described in a letter addressed to me from J. Eldon Opheim of March 28, 1972 attached as Exhibit A.) The Port has an agreement with Local 9 of the ILWU to perform the warehouse work. Local 9 of the ILWU are warehouse employees. They are not longshoremen, marine clerks or walking boses. They are not included in the PMA/ILWU Pacific Coast Longshore Agreement. They are not hired through the PMA/ILWU hiring hall, they are not involved in the PMA/ILWU pension and welfare programs, and their contracts are not in any way negotiated by PMA but rather by a different group of employers. It should be explained that of the approximately 60,000 members of the ILWU only about 14,000 are longshoremen, marine clerks, and walking bosses with whom PMA contracts. So far as PMA is concerned Local 9 in Seattle, like Local 6 in San Francisco area, are no different from teamsters or other unions unrelated to the ILWU.

Local 19 at the Port of Seattle are the longshoremen doing longshore work. Locals 52 and 98 are marine clerks and walking bosses. These Locals are included in

the workforce of the PMA/ILWU agreements.

So long as the Port of Seattle in operating their socalled back-up warehouses and employing Local 9 labor in those warehouses use such labor for warehouse work there has been and presumably would be no strife between Local 9 and the longshore locals. However, in a small part of their warehouse operation, I am informed less than 5%, are engaged in work which other locals consider CFS work in stuffing and unstuffing containers. It is this work which has caused the problem. Sometime ago Seattle asserted that it would make other arrangements for this activity (see Exhibit A).

The problem is one of internal strife between the various locals of the ILWU. The longshore locals feel

This has created some work disruption and is the matter which Mr. Bridges, myself, Mr. Flynn and others at the negotiating table referred to as the "Seattle problem". It is a problem which PMA cannot solve and it is a problem which Mr. Bridges stated in the negotiations was one which he would handle. In references in the documents filed by the petitioning and intervening ports in which Mr. Bridges made some comments about putting Seattle out of business, it was and is my understanding that he was referring to his forcing Local 9 to stick to warehousing activities so that the CFS operations at the warehouses performed by Local 9 under Seattle's employment would be stopped and that work

would be performed by longshore workers.

The CFS Supplement to the February 10, 1972 Memorandum of Understanding between PMA and ILWU is an amendment to a prior CFS agreement between PMA and ILWU. It is not in any way limited to the Port of Seattle or any other Northwest Ports, but it does relate to a similar problem to that described above existing elsewhere as well as to the Seattle problem. In other areas, particularly in California, there developed a dispute between the longshoremen and other unions concerning the operation of container freight stations in the stuffing and unstuffing of containers. The problem, simply stated, is that the longshoremen who have an agreement with PMA members consider that stuffing and unstuffing of containers is longshore work. The place where the work is performed creates a complication. There appears to be no real inter-union dispute that if the work is actually performed on the dock it is longshore work. If the stuffing and unstuffing is performed inland, say 50 miles or more, there is little disagreement that it is not longshore work. A gray area exists between those two extremes. The CFS Supplement negotiated between PMA and ILWU is designed to require that the CFS work within a specified perimeter from the dock be performed by ILWU longshoremen employed by PMA members, and if it is not, that a container tax be assessed-or alternatively that the cargo be re-handled or stuffed and unstuffed by longshore workers regardless of whether it is also performed by non-longshore workers.

The CFS Supplement has been the subject of litigation. This litigation demonstrates that the CFS Supplement is unrelated to the dispute as to the Nonmember Participation Agreement. Further, as a result of this litigation the CFS Supplemental Agreement has been enjoined pending determination in the first instance of the National Labor Relations Board, and hence could hardly

be the subject of petitioners' complaint here.

The Port of Seattle on April 4, 1972 filed a complaint in the U.S. District Court, N.D. Washington, against PMA, the ILWU, Locals 19 and 52, and members of the PMA who do business in Seattle. That complaint, a copy of which is attached hereto as Exhibit B, alleges many of the very arguments, contentions, allegations and statements in the briefs and affidavits which have been filed in this proceeding by the Port of Seattle. This subject, involving CFS Supplement and the inter-union dispute between Locals 9 and 19, has nothing whatsoever to do with the Nonmember Participation Agreement, Supplement No. 4, which is the subject of this proceeding. This is clearly shown by the fact that Seattle's complaint making all of these allegations was filed April 4, 1972, whereas Supplement No. 4 was not even signed until April 25, 1972.

An injunction against PMA and ILWU implementing their CFS Supplement has been issued by U.S. District Court for the Southern District of California in Los Angeles, pending consideration by the National Labor Relations Board. This litigation is referred to in Hearing Counsel's Brief in this docket. Whether Supplement No. 4 had been agreed to, whether Seattle signed the new Nonmember Agreement or not, or whether Seattle became a member of PMA, would not solve the so-called "Seattle problem" of Local 9 performing CFS work which Local

19 claims belongs to it.

I now turn to the other subjects covered in the affidavits.

The affidavit of Richard D. Ford filed in this proceeding on behalf of the Port of Seattle asserts that if through failure to sign the Nonmember Participation Agreement contained in Supplement No. 4 the Port is denied access to the PMA/ILWU workforce, certain specific terminals at the Port of Seattle would be required to shut down. I believe this to be a gross exaggeration. In my opinion failure to sign the Nonmember Participation Agreement would simply mean that the Port would have to employ those few longshoremen and walking bosses, as well as the substantial number of clerks, they now secure from the PMA/ILWU workforce from some other source. In addition, the Port would have to make its own arrangements with the new workforce for various fringe benefit coverages and also process their own payroll. That is the very essence of PMA's position in regard to the nonmember situation. If the Port of Seattle or any other nonmember entity wants to continue to utilize the PMA/ILWU workforces and participate in the various tangential situations arising out of the PMA/ILWU collective bargaining agreements, they should be entitled to them only if they (the Port) participate on an equal basis in all collective bargaining matters as do PMA members. If they choose not to participate, they are then a free agent to secure labor, perform their normal functions and negotiate their own separate collective bargaining agreements with whatever group might obtain jurisdiction. As stated in the prior affidavits filed on behalf of PMA and on behalf of ILWU in the proceeding, the Port of Seattle could find another workforce to take the place of the present men utilized from the ILWU/PMA workforces. The Port would not, in my opinion, be required to shut down any of its facilities.

The petitioning ports attempt to make a considerable point out of the references at the time of reaching the February 10th agreement that it covered the economic issues and that other so-called non-economic issues (which in this context included Supplement No. 4) would be continued to be negotiated, mediated or arbitrated. These terms were used in a narrow sense. What was

meant by economic issues was those issues to which could be affixed a specific cents/hour cost—in effect the issues which would go to the Wage and Price Boards for approval. The so-called "non-economic" issues which were referred to upon reaching the February 10th agreement included many matters which effected the economic well being of both the employers and the employees and most certainly included matters which involved working conditions of the employees. I include in that category matters involved in Supplement No. 4. For example, Supplement No. 4 is very directly concerned with the ability of the ILWU workers to have their hours credited towards ILWU/PMA pension and welfare when employed by a nonmember.

The affidavit of Mr. Ford (pp. 4-6) contains a number of allegations under the caption "Acts of PMA to Compel Seattle to Become a PMA Member". Similar allegations were made in the complaint filed April 4, 1972 by Seattle against PMA in the U.S. District Court referred to previously. Mr. Ford has misinterpreted concientious efforts by PMA to solicit membership for the common benefit of the Port of Seattle, the PMA and PMA/ILWU workforce, as threats and attempts to com-

pel membership.

Undoubtedly, PMA has from time to time over the years solicited Seattle's membership. It is an advantage to any employer's collective bargaining association to have as many members as possible and to present as great a united front in negotiations with labor as possible. But I categorically deny that I, or to my knowledge, any PMA official has threatened to compel Seattle to join PMA. The very fact that Seattle has enjoyed the benefits of nonmember participation agreements with PMA and the ILWU and still does belies the contention.

As to the specific allegations: The letter of December 23, 1970 sent to Seattle and to other members did invite the recipients to join PMA. It also, as a courtesy, advised them of PMA's initial negotiating position presented to the ILWU on December 7, 1970 as quoted at page 6 of my prior affidavit in this docket. It contained no threats. If on January 29, 1971 representatives of

PMA did visit Seattle "for the express purpose of soliciting nonmember ports, including Seattle" which is all that is claimed as to that meeting. I was not aware of it. As to organizing a meeting on February 26, 1971 at Sacramento, I never had any part in such alleged activities and I have no recollection of authorizing any member of PMA's staff to organize such a meeting. I do note that the affidavit of Mr. Ford does not state such a meeting took place but only that it was organized. I do recall several telephone calls with Mr. Ford but I believe he has misunderstood the nature of my statements to him. In some conversations we were dealing with the CFS subjects, in others with the nonmember issue. I did urge the Port of Seattle to join PMA but I never threatened. Basically I was endeavoring in all of these conversations to make clear to the Port of Seattle the PMA negotiating posture on these two issues.

> /s/ B. H. Goodenough B. H. Goodenough

Subscribed to and sworn to before me this — day of January, 1973.

/s/ Joan Fowler Notary Public "EXHIBIT A" TO GOODENOUGH AFFIDAVIT

PORT OF SEATTLE P.O. Box 1209 Seattle, Washington 98111

March 28, 1972

Mr. Ben Goodenough, Vice President Pacific Maritime Association P.O. Box 7861 San Francisco, California 94120

Dear Ben:

This will confirm oral conversations between the two of us and other Port staff members concerning the operation of Port of Seattle "backup" warehouses and the impact of Section 1.55 of the Container Supplement on those operations.

As we have stated, the Port's warehouses are bona fide warehouse operations which place the cargo in the storage position for average time periods of 90 to 120 days. The Port has a valid and enforceable labor agreement with ILWU Local 9 to perform all warehouse work which has been in effect for many years and was recently renewed. The agreement had the full blessing of the ILWU, both regionally and coastwise. We think much of the confusion arises from some fuzzy thinking on distinctions between CFS work, consolidating, freight forwarding, warehousing et al.

To try to set the record straight we want to outline the facts of our operation in the hopes that this will clear the air. For practical purposes, no cargo is moved to a warehouse unless it is OCP freight and is going into a storage position. Emergencies may on occasions move cargo through the warehouse after only a short storage period, but this is costly for the user, thus, very rare. "Mixed" containers, i.e., those containing some cargo destined for warehouse and other cargo for direct move-

ment inland, are stripped at a CFS shed using ILWU Local 19 labor and the warehouse portion of the cargo is separately drayed to the warehouse. This is our practice and will continue to be our practice. The only containers shipped direct to warehouse are units containing cargo destined only for warehouse positioning. Such units are delivered by the steamship line on a "CY" basis.

The Port is also a shipper's agent. We are not "freight forwarders" or "consolidators" in the sense that those terms are usually used. As a shipper's agent we place on a single bill-of-lading (truck or rail and occasionally air) cargo of two or more shippers in order to achieve the most advantageous inland carriage rate. Pursuant to this bill of lading, we instruct the inland carrier of the locations of the cargo so that he can perform the pick up. Basically the Port performs no labor in this process, except where some portion of the cargo under the "consolidated" bill-of-lading is picked up at the backup warehouse. In that event, Port of Seattle warehouse labor "picks" the cargo from its storage position and delivers it to a loading dock where the inland carrier takes delivery and loads to his vehicle.

It is almost unheard of to load consolidated bill-of-lading shipments into rail boxcars at the warehouse. However, whatever minimal rail boxcar loading that is done at back up warehouses is performed by ILWU Local 9.

The more typical "consolidated" bill-of-lading shipments are as follows:

- "Marriage of containers"—full containers of two
  or more shippers are ordered direct to flat car
  under a single bill-of-lading to obtain the lowest
  possible COFC rate. This is a "CY" delivery situation. The inland carrier's personnel takes delivery
  at the CY from the terminal operator.
- Transload containers to "High Cube" Inland Carrier Equipment. Containers of two or more shippers are unloaded directly into piggyback equipment of rails. This involves ILWU Local 19 labor unloading the container and passing the cargo di-

rect to the teamster "at tailgate" who loads the inland vehicle, at terminal and other CFS locations which have been previously identified for you.

- 3. "Split pick up by Inland Carrier." This involves the inland carrier vehicle going to two or more locations to pick up stripped or break bulk shipments of two or more shippers. The pick up can be made at transit sheds, CFS or warehouse. In this case, normal delivery practices apply and the inland carrier loads his own vehicle.
- 4. Single pick up for loading stripped or break bulk cargo of two or more shippers into inland carrier vehicle. This occurs when the cargo of two or more shippers combined on single bill-of-lading is located at the same terminal, CFS shed or warehouse. The procedures here are the same as 3 above only no split pick up is required.

These are the principal examples of the so-called Port "consolidation." We do not operate a freight forwarding business, nor do we physically consolidate at a single location as to the Ports of San Francisco or Oakland. In fact, the Port of Seattle performs no physical labor, either direct or indirect, in consolidation except to "pick" and make available (pursuant to our storage tariff) at the loading dock cargo in our warehouses. Also, at Portoperated terminals the Port provides the Local 52 delivery checker.

The Port's so-called "consolidation" is entirely a paper-work operation which places the cargo of two or more shippers on a single prepaid bill-of-lading and directs the inland carriers in their pick up of cargo pursuant to the inland bill-of-lading. The Port thereafter bills each shipper his proportionate share of the inland freight charges. Our operations have been under regular surveillance of federal regulatory agencies and to date have received a clean bill of health.

I hope this gives you the factual background you need. Incidentally, as I indicated before, the direct to ware-

house containers in 1971 involved about five per cent of the number of manhours at PMA member operated CFS sites, including but not limited to Terminal 102.

We see no indication that this proportion will change in the foreseeable future. Our position is unchanged, i.e., warehouse functions are not in the jurisdiction of the Coast Agreement or CFS document as we understand it, and that in any event the longstanding Port/Local 9 agreement cannot be abrogated by sole action of PMA and the ILWU.

Yours very truly,

/s/ Richard D. Ford for J. ELDON OPHEIM General Manager

RDF:pa

"EXHIBIT B" TO B. H. GOODENOUGH AFFIDAVIT

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Civil No. 214-7202

COMPLAINT

JURY DEMAND

PORT OF SEATTLE, a municipal corporation, PLAINTIFF,

218.

PACIFIC MARITIME ASSOCIATION, a corporation; INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association; INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION LOCAL 19, an unincorporated association; INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION LOCAL 52, an unincorporated association; ALASKA STEAMSHIP COMPANY; AMERICAN MAIL LINE, LTD.; AMERICAN PRESIDENT LINES, LTD.; BALFOUR, GUTHRIE & CO., LTD.; BARBER STEAMSHIP LINES, INC.; BRADY-HAMIL-

TON STEVEDORE CO. OF WASHINGTON; CALMAR STEAM-SHIP CORPORATION; CONTAINER FREIGHT SYSTEM, LTD.; CONTAINER STEVEDORING CO., INC.; CRESCENT WHARF & WAREHOUSE COMPANY; CROWN ZELLERBACH CORPO-RATION: CRUSADER SHIPPING CO., LTD.; FLOTA MER-CANTE GRANCOLOMBIANA, S.A.; FREIGHTCARE, LTD.; FRENCH LINE; GREAT EASTERN SHIPPING CO., LTD.; HAPAG-LLOYD AG; HOLLAND-AMERICA LINE; INTERNA-TIONAL SHIPPING COMPANY: INTERNATIONAL SHIPPING Co., Inc.; Italian Line; Japan Line, Ltd.; Johnson LINE; JONES STEVEDORING COMPANY; KAWASKI KISEN KAISHA, LTD.; KERR STEAMSHIP COMPANY, INC.; KNUT-SEN LINE; MATSON NAVIGATION COMPANY; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; THE OCEANIC STEAMSHIP CO.; OLYMPIC STEAMSHIP CO., INC.; OVERSEAS SHIPPING COMPANY; PACIFIC AUSTRA-LIA DIRECT LINE: TRANS-AUSTRAL SHIPPING PTY. LTD.; PACIFIC FAR EAST LINE, INC.; PACIFIC ISLANDS TRANS-PORT LINE; PHILIPPINE PRESIDENT LINES; P & O LINES (NORTH AMERICA) INC.; RELIABLE LINE SERVICE; ROTHSCHILD WASHINGTON STEVEDORING CO.; SEA-LAND SERVICE, INC.; SEATRAIN INTERNATIONAL, S.A.; SEA-TRAIN LINES, CALIFORNIA; SEATTLE BULK LOADING TERMINAL, INC.; SEATTLE STEVEDORE COMPANY; STATES MARINE LINES; STATES STEAMSHIP COMPANY; TAIWAN NAVIGATION CO., LTD.; TOKAI SHIPPING CO., LTD.; TRANSPACIFIC TRANSPORTATION CO.; UNITED PHILIP-PINE LINES, INC.; UNITED STATES LINES, INC.; WEST-FAL-LARSEN LINE; WILLIAMS, DIMOND & Co.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD. DEFEND-ANTS.

Plaintiff brings this civil action under the antitrust laws for an injunction against the defendants and each of them, for treble damages and costs of suit, including a reasonable attorney fee, and alleges:

# JURISDICTION

1. This Court has jurisdiction of the parties and the subject matter by reason of 15 U.S.C. §§ 15, 22 and 26.

2. Each defendant resides, is found in, or has an agent and transacts substantial business in this Judicial District. The acts in violation of the antitrust laws herein alleged have been and are being carried out, in part, within this Judicial District.

3. Plaintiff has been injured in its business and property by reason of defendants' past and continuing acts, hereinafter described, that are forbidden by the antitrust

laws.

4. Plaintiff is threatened immediately with the danger of additional irreparable loss and damage to its business and property by reason of defendants' continuing acts, hereinafter described, in violation of the antitrust laws. Conditions and circumstances exist which would constrain a court of equity, under rules governing such proceedings, to grant immediate injunctive relief against the continuing illegal acts of the defendants.

#### DESCRIPTION OF THE PARTIES

5. The Port of Seattle is a municipal corporation organized and existing under the laws of the State of Washington. The Port exercises public functions as a port district under the provisions of RCW Title 53, and as a wharfinger and warehouseman under the provisions of RCW title 81, Chapter 94. Pursuant to statute, the Port owns and operates both marine terminal facilities and warehouses. It derives its revenue from wharfage and dockage charges to ocean carriers for use of its marine terminals, from the lease or rental of certain of its real or personal property to ocean carriers and others, and from charges made for warehousing services offered to shippers and consignees, as hereinafter defined.

6. Defendant Pacific Maritime Association is a corporation organized and existing under the laws of the State of California and composed of steamship lines, steamship agents, stevedoring companies and warehousing companies operating in Pacific Coast ports of the United States, and three of such ports. It was formed in 1949 by consolidation of the Waterfront Employers Association of the Pacific Coast, the Waterfront Employers Association of California, and the Pacific American Shipowners

Association.

7. Defendants Alaska Steamship Company; American Mail Line, Ltd.; American President Lines, Ltd.; Balfour, Guthrie & Co., Ltd.; Barber Steamship Lines, Inc.; Brady-Hamilton Stevedoring Co. of Washington; Calmar Steamship Corporation; Container Freight System, Ltd.; Container Stevedoring Co., Inc.; Crescent Wharf & Wharehouse Company; Crown Zellerbach Corporation; Crusader Shipping Co., Ltd.; Flota Merchante Grancolombiana, S.A.; Freightcare, Ltd.; French Line; Great Eastern Shipping Co., Ltd.; Hapag-Lloyd AG; Holland-America Line; International Shipping Company; International Shipping Co., Inc.; Italian Line; Japan Line, Ltd.; Johnson Line; Jones Stevedoring Company; Kawasaki Kisen Kaisha, Ltd.; Kerr Steamship Company, Inc.; Knutsen Line; Matson Navigation Company; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; The Oceanic Steamship Co.; Olympic Steamship Co., Inc.; Overseas Shipping Company; Pacific Australia Direct Line; Trans-Austral Shipping Pty. Ltd.; Pacific Far East Line, Inc.; Pacific Islands Transport Line; Philippine President Lines; P & O Lines (North America) Inc.; Reliable Line Service; Rothschild Washington Stevedoring Co.; Sea-Land Service, Inc.; Seatrain International, S.A.; Seatrain Lines, California; Seattle Bulk Loading Terminal, Inc.; Seattle Stevedore Company; States Marine Lines; States Steamship Company; Taiwan Navigation Co., Ltd.; Tokai Shipping Co., Ltd.; Transpacific Transportation Co.; United Philippine Lines, Inc.; United States Lines, Inc.; Westfal-Larsen Line; Williams, Dimond & Co.; and Yamashita-Shinnihon Steamship Co., Ltd. are members of the Pacific Maritime Association which operate in Seattle.

8. Defendant International Longshoremen's and Warehousemen's Union is an unincorporated association operating in all ports on the West Coast of the United States.

9. Defendant International Longshoremen's and Warehousemen's Union Local 19 is an unincorporated association operating on the Seattle waterfront with its main office in Seattle, Washington. Its members perform longshore functions at the Port of Seattle marine terminal facilities.

10. Defendant International Longshoremen's and Warehousemen's Union Local 52 is an unincorporated association operating on the Seattle waterfront with its main office in Seattle, Washington. Its members perform the "checking" function at the Port of Seattle marine terminal facilities.

#### DEFINITIONS

#### 11. As used herein:

(a) "Shipper" means the person who contracts for the delivery of cargo and directs its method of shipment.

(b) "Consignee" means the person to whom the cargo

is shipped.

(c) "Ocean carrier" means the steamship line which is employed by the shipper for the water transportation

of cargo.

(d) "Ocean bill of lading" means the written contract of affreightment between the shipper and ocean carrier; the bill of lading designates the consignee and the location for the delivery of the cargo to the consignee or his agent.

(e) "Container" means a re-usable metal, wooden, or plastic van into which goods are packed for carriage by sea. Containers are said to be "intermodal" in that they may be off loaded from ocean vessels and put directly aboard motor and rail carriers for inland transportation

without disturbing the contents thereof.

(f) "Container yard" (CY) is a location where containers loaded with goods are received or delivered, to or from the vessel or to or from the inland carrier. A shipper may designate CY delivery on the bill of lading. The ocean carrier's responsibility for the container cargo under an ocean bill of lading specifying "CY delivery" is terminated upon the delivery of the loaded container at the container yard to the consignee or his agent. Container yards are operated by both PMA members and the Port of Seattle.

(g) "Container Freight Station" (CFS) is a facility operated by a PMA member ocean carrier or his PMA member agent where containers are loaded with goods

or unstuffed of goods immediately prior or subsequent to a movement by water. A shipper may designate CFS delivery on the bill of lading. The ocean carrier's responsibility for the container cargo is terminated under an ocean bill of lading specifying "CFS delivery" when the cargo is unstuffed from the container and tendered to the consignee or his agent in break-bulk (or loose) form. The shipper pays an additional charge for CFS work under the rates published by the ocean carrier in its tariff.

(h) "Warehouse" means a structure used to hold goods for storage. Cargo may move from either a CY or CFS to a warehouse. The Port of Seattle owns and operates certain warehouses for the storage of ocean borne export-

import cargo.

(i) "Overland Common Point" (OCP) is a geographical designation for the destination of export-import cargo. In the context of this trade OCP cargo means destined for (or originating from) overland common points east of Denver, Colorado. Most OCP cargo flowing through the Port of Seattle is import cargo in containers. OCP cargo is distinguished from "local" cargo destined to (or originating from) points west of Denver.

# RELEVANT MARKET

12. The market and line of commerce herein involved is export-import containerized cargo to or from ports on the west coast of the United States, including the handling and storage of such cargo while at such ports.

# COMMERCE INVOLVED

13. Plaintiff and all defendants are involved in one or more phases of the continuous movement of containerized

cargo in interstate and foreign commerce.

14. The movement of containerized cargo is a multimillion dollar industry. The advent of the container has revolutionized the shipping industry. Containerization of cargo in export-import trade is expanding rapidly and is supplanting break-bulk shipments as to much of the interstate and foreign commerce of West Coast ports. The industry involves the ocean shipment of containers by steamship, barge or other vessel, the inland transportation by rail, truck or other means, the handling and storage of such containers at port marine terminals, the stuffing and unstuffing of such containers, the warehousing of some of the contents of such containers, and the services of ships agents, customs house brokers, and others. Shippers and consignees of substantial quantities of cargo specify container shipment in order to minimize soilage, pilferage or breakage and to minimize delivery time, and pay a premium for the service.

15. In all the foregoing respects interstate and foreign commerce has been, and is being, restrained and affected

by the antitrust violations herein alleged.

# PORT OF SEATTLE TRAFFIC

16. The Port of Seattle is charged by statute with the responsibility for, inter alia, the promotion and development of water borne commerce through the harbor of Seattle.

17. The Port of Seattle enjoys extensive water borne traffic with the vessels of many nations. Annually over 2,500 vessels visit the Port of Seattle in offshore trade. The Port has, in the past decade, experienced greatly increased business, in part due to the aggressive trade development program initiated by Port management. Seattle foresaw the impact of containerization on international trade and made extensive capital investments to attract container traffic to the Port, Seattle's volume of container traffic rose almost 400% between 1960 and 1970, with a 55% increase from 1969 to 1970 alone. Seattle has surpassed all Pacific Coast ports in OCP traffic and presently accounts for approximately 40% of West Coast OCP imports. Unless restrained by the illegal conduct of the defendants herein, the Port will continue to experience rapid growth in containerized traffic through its Harbor. The Port plans further extensive capital investment to attract and support its growing water-borne commerce.

18. Unlike other West Coast ports including those in California, the Port of Seattle is an "operating port;" it operates marine terminals and warehouses rather than simply acting as a landlord of facilities leased to carriers and others. The warehousing program of the Port of Seattle, in particular, has attracted considerable traffic through the Port's harbor. Shippers who ship through the Port of Seattle rely on the Port's warehouses for the storage of goods as part of their overall national distribution plans. While OCP import shippers send the great majority of their containerized cargo straight through to its ultimate inland destination, they usually employ Port warehouses for the storage of a portion of their goods. The warehousing program of the Port is an integral part of the functions performed by the Port for shippers. Shippers will not use the Port's facilities for "straight through" OCP shipments unless warehousing is available from the Port of Seattle. Without warehouse capability, the Port will lose both cargo that would otherwise have been warehoused and OCP cargo moving through the Port without warehousing.

19. On December 31, 1971, the book value of the Port of Seattle's investments in marine land, facilities and equipment was \$137,605,788. Total contracts in force or awarded for construction or improvement of Port of Seattle marine facilities then exceeded \$11,634,025. Terminal 106, a warehouse complex for storage, warehousing and handling of OCP cargo, was purchased by the Port

in 1970 for \$4,000,000.

20. Gross revenue of the Port of Seattle from marine operations increased from \$4,959,543 in 1966, to \$11,865,190 in 1971; while tonnage at Port operated or leased terminals increased from 2,556,412 tons in 1966, to 2,920,883 in 1969, to 3,363,683 in 1970.

# DESCRIPTION OF THE UNLAWFUL CONSPIRACY, COMBINATION AND ATTEMPTS TO MONOPOLIZE

21. Commencing at some time in the past, the exact date being presently unknown to plaintiff, and continuing up to and including the date of the filing of this

complaint, the defendants have combined together and with other persons, associations and corporations, the identities of some of whom are still unknown to plaintiffs, and, acting concertedly together through agreement and understanding, have adopted and conducted common plans and programs having the following objectives and results:

(a) To monopolize, dominate and control the business of moving containerized cargo in foreign and interstate commerce from and to West Coast ports, including the handling and storage of such cargo while at such Ports;

(b) To force shippers and consignees to deal with non-members of the defendant PMA, including the plaintiff, on terms substantially less advantageous than with members of the PMA, thereby enforcing a concerted boycott by shippers and consignees of nonmembers of the defendant PMA. The effect of such boycott would be to make it difficult or impossible for non-members to remain in business;

(c) To use their monopoly power and domination in the market to eliminate plaintiff as a non-PMA member

competitor;

(d) To force plaintiff, and others, to join the Pacific Maritime Association in order to exert control over their activities:

(e) To divert cargo destined for storage at warehouses operated by the Port of Seattle to warehouses operated by members of the PMA, with the attendant diversion of revenue from the Port of Seattle to PMA members;

(f) To achieve for themselves additional revenue which would not otherwise be earned but for the unlawful con-

duct herein alleged; and

(g) To regulate, dominate and restrain interstate and foreign commerce in containerized cargo, concentrate containerized cargo at ports in which members of the Pacific Maritime Association have the greatest financial interest and to otherwise cause the businesses of moving and storing containerized cargo to be operated under artificial and non-competitive conditions.

# ACTS AND PROGRAMS IN FURTHERANCE OF THE CONSPIRACY AND COMBINATION AND ATTEMPTS TO MONOPOLIZE

Defendants have committed and engaged in the following acts and programs in carrying out the aforesaid conspiracy and combination in restraint of trade and attempts to monopolize:

22. The PMA has been and continues to be dominated, directed and controlled by ocean carriers, stevedoring companies and other who have their headquarters and large financial investments within the State of California. The voting and other provisions of its organizational agreement and bylaws of the FHA are designed to perpetuate the domination of such members over the policies and affairs of the PMA, no matter how many additional members are admitted. Should the Port of Seattle be forced to join the PMA, the Port of Seattle would consistently be outvoted on matters of concern to it: for example, ocean carriers have one vote for each 50,000 tons of cargo, while port members only have one vote; 11 of the 15 directors of the PMA are selected by ocean carriers and the other four are selected by the remaining members; 6 of the 7 director members of the PMA Executive Committee must be ocean carrier selectees; and the Board of Directors may by majority vote suspend or expel any member.

23. From and after December 23, 1970, defendant PMA has engaged in an attempt to compel the Port of Seattle to become a PMA member. The defendant PMA has threatened to exclude non-PMA members including the Port of Seattle, from the use they now enjoy of PMA-ILWU hiring halls and their participation in the PMA-ILWU benefit plans. The unlawful activity of the defendant PMA and defendant ILWU complained of herein is motivated in substantial measure by defendant PMA's desire to compel the Port of Seattle to become a PMA member or, in the alternative, to remove the Port of Seattle from competition with PMA members.

24. The defendants entered into a MEMORANDUM OF UNDERSTANDING between PMA and the ILWU, dated February 10, 1972. In that agreement there is a provision under the heading of APPLICABLE TO LONG-SHORE AND CLERKS at paragraph V at page 25, which amends the Coast Container Supplement by the insertion of the following contractual provision:

"1.55 Containers originating at or destined for delivery to a non-PMA member facility employing ILWU labor within the Port Area CFS Zone shall be stuffed or unstuffed by ILWU labor employed by an employer's signatory to the PCL & CA [Pacific Coast Longshore and Checkers' Agreement] or this CFS [Container Freight Station] Supplement, unless cargo in such containers has tax-free status under Section 1.531(c) through (g).

The above cited provision is hereinafter referred to as "the provision."

25. The stated purpose of defendants in adopting the provision was to put the Port of Seattle out of business.

26. Prior to the implementation of the contract provision referred to herein, and for many years, containers on a "CY delivery bill of lading destined for a Port warehouse moved directly from the container yard to the Port warehouses intact. With the implementation of the unlawful contract provision, defendants have now refused to release containers from container yards unless and until such containers were first delivered to CFS transit sheds for unstuffing by employees of defendant PMA members who belong to defendant ILWU locals.

# EFFECTS OF THE VIOLATIONS

The intended and actual effects and results of the combination and conspiracy in restraint of trade and to monopolize and of the attempts to monopolize hereinabove alleged have been and are:

27. Implementation of the contractural provision complained of herein would require containers shipped or.

"CY delivery" bill of lading to be delivered to a CFS station operated by a PMA member and there undergo an unstuffing process. The contents of the container would then be delivered in break-bulk form to the consignee or his agent for carriage to a Port warehouse. At the Port warehouse, the cargo would again be unloaded and then sorted and placed in storage. The effect of the unlawful contract, therefore, is to require containers destined for Port warehouses to undergo a completely useless and wasteful process which has no utility to the shipper and only results in expense, damage, pilferage, harassment, and delay. By the provisions of the same contract, however, containers destined for warehouses operated by PMA members would be delivered directly to the PMA member warehouse without any requirement for unstuffing at a CFS. .

28. The plaintiff has incurred additional cost and has suffered consequent damage in taking emergency measures to protect containerized cargo destined for plaintiff's warehouses. Prior to and continuing to the date hereof, the defendants and the coconspirators have wholly refused to permit the plaintiff to take such emergency measures, and containerized cargo is stranded on the

docks.

29. The useless work which the defendants now require of containers destined for Port warehouses will restrict container cargo flowing through the Port's harbor because of:

(a) The increased breakage and pilferage attendant upon the additional stuffing or unstuffing process; or

(b) The increased time in transit of goods subjected

to the additional stuffing and unstuffing process.

30. If the unlawful contract is implemented, the financial and other burden imposed by the wholly unnecessary and wasteful process of unstuffing will cause shippers to utilize other PMA member warehouse facilities and ship through other ports.

31. Defendants have attained and exercised, and now exercise monopoly power in the business of movement of containerized cargo into and out of West Coast ports.

32. Competition in this business has been and is being substantially eliminated or impaired, and plaintiff and the public have been and are being denied the rights and benefits of free and open competition.

33. Interstate and foreign commerce has been and is

being substantially restrained and affected.

#### INJURY TO PLAINTIFF

34. As a direct result of the combination and conspiracy in restraint of trade and to monopolize and of the attempts to monopolize hereinabove alleged, plaintiff has been and will be injured in its business and property to the extent of the additional cost it has incurred and will incur in taking emergency protective measures and will suffer permanent, irreparable harm to its business and property in that it will irrevocably lose a substantial portion of the containerized cargo it has successfully attracted to the Port of Seattle, it will suffer the loss or substantial impairment of its investment in marine terminals, container handling equipment, warehouses and other assets, and it will be destroyed as an effective future competitor for containerized traffic. The dollar amount of such loss is presently undetermined.

# INJUNCTION NECESSARY

35. An emergency exists. Containers destined for Port of Seattle warehouses sit on the docks of the Port and cannot be moved without additional processing through a PMA member operated CFS station. Shippers have announced their intention to direct other shipments through other ports and to PMA member warehouse facilities unless and until their containers can be delivered intact to Port warehouses. Every day lost produces a crisis for the Port and for its shipping customers. Unless the continuing acts of defendants in violation of the antitrust laws, particularly the enforcement of the above-described unlawful contract, are immediately restrained, plaintiff will suffer immediate and irreparable damage to its business and property through continuing mone-

tary loss and loss of its customers. Conditions and circumstance exist which would constrain a court of equity, under rules governing such proceedings, to grant injunctive relief against the continuing unlawful acts of the defendants. Unless defendants are thus enjoined by the Court, they will continue to combine and conspire in restraint of trade and to monopolize, and will continue to implement and enforce their unlawful contract to destroy and eliminate the Port of Seattle as a competitor.

#### STATUTES VIOLATED

36. The combination and conspiracy in restraint of trade and to monopolize and the attempts to monopolize hereinabove alleged have been and are in violation of Section 1 of the Sherman Act (15 U.S.C. § 1); Section 2 of the Sherman Act (15 U.S.C. § 2); and Section 3 of the Clayton Act (15 U.S.C. § 14).

#### CO-CONSPIRATORS

37. In performing and carrying out the conspiracy and combination in restraint of trade and to monopolize and the attempt to monopolize hereinabove alleged, defendants have combined and conspired with Anacortes Stevedoring Company; Associated Banning Company; Auto Terminal International; Bellingham Stevedoring Company; Benicia Port Terminal Company; The Blue Star Line, Inc.; Brady-Hamilton Stevedore Co.; California Stevedore & Ballast Co.; California United Terminals; Canadian Gulf Line, Ltd.; Capitol Stevedore Company; CFS Corporation; Coast Stevedore Company; Consolidated Marine, Inc.; Consolidated Stevedoring Co., Inc.; Crescent City Marine Ways & Drydock Co., Inc.; Diablo Service Corporation; The East Asiatic Co., Inc.; Elvalsons-Stevedoring Division; Everett Stevedoring Company; Fibrex & SDipping Co., Inc.; General Stevedore & Ballast Co.; Howard Terminal; Independent Stevedore Company; Indies Terminal Company; Interolsen Agencies, Inc.; W. J. Jones & Son, Inc.; Los Angeles Container Terminal Co., Inc.; Maersk Line Agency; Marine Terminals Cor-

poration: Marine Terminals Corporation of L.A.; Matson Terminals Inc.; Metropolitan Stevedore Company; National Lines Bureau, Inc.; Fred F. Noonan Company, Inc.; Norkerr Services; Norsk Pacific Steamship Co., Ltd.; Northwest Marine Service Co.; Oakland Container Terminal Co., Inc.; Ocean Terminals Company; Olympia Stevedoring Co.; Olympic Peninsula Stevedoring Co.; Oregon Stevedoring Company; Pacific Oriental Terminal Co.; Parr-Richmond Terminal Co.; Portland Lines Bureau; Portland Stevedoring Company; Port of Astoria; Port of Kalama; Port of Vancouver; San Francisco Line Service Co.; San Francisco Stevedoring Co., Inc.; Scrap Loaders, Inc.; Seatrain Terminals of California, Inc.; Shamrock Steamship Company; Shipmasters' Assistants' Assn.; Showa Kaiun Kaisha, Ltd.; Signal Terminals, Inc.; Star Terminal Co., Inc.; Stockton Stevedore Warehouse Co.; Tacoma Line Handling Co.; Tacoma Stevedore & Terminal Co.: Transocean Gateway Corporation; Twin Harbor Stevedoring Co.; Universal Terminal & Stevedoring Corp. of Calif.; Vaasa Line OY; Western Stevedoring & Terminal Corp.; Westfal-Larsen Company, Inc.; Westfall Stevedore Co.; and Willapa Harbor Stevedoring Co., who are members of PMA not operating at the Port of Seattle, and others presently not known to plaintiff.

PRAYER

- 38. Plaintiff prays judgment against the defendants and each of them as follows:
- (a) That the Court issue its injunction permanently restraining defendants and each of them from implementing and enforcing their unlawful contract described above; or from in any other way, directly or indirectly, effecting the stuffing and unstuffing process it requires; or from in any way, directly or indirectly, unlawfully interfering with the delivery of loaded containers to warehouses operated by the Port of Seattle; and from engaging in the unlawful conspiracy, combination and conduct in violation of the antitrust laws hereinabove alleged;

(b) That plaintiff have judgment in the amount of damages determined to have been sustained by it, and that the said amount be trebled by the Court, as required by law;

(c) That plaintiff have judgment for its costs of this

action; and

(d) That plaintiff have judgment as provided by law for attorney fees in an amount determined by the Court to be reasonable.

#### JURY DEMAND

Plaintiff respectfully demands a jury pursuant to Rule 38(b), Federal Rules of Civil Procedure.

DATED: March -, 1972.

CULP, DWYER, GUTERSON & GRADER PRESTON, THORGRIMSON, STARIN, ELLIS & HOLMAN

By	Louis F. Nawrot, Jr.
Ву	
	ROBERT A. KEOLKER
Ву	GERALD GRINSTEIN
Ву	MICHAEL B. CRUTCHER

# BEFORE THE FEDERAL MARITIME COMMISSION

Docket No. 72-48

[Received Jan. 12, 1973]

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

# REPLY OF HEARING COUNSEL TO MEMORANDA OF LAW

#### I. INTRODUCTION

In our memorandum of law submitted to the Commission on December 15, 1972, Hearing Counsel took the position that the agreements alleged to exist between the PMA and ILWU, although not without Shipping Act implications, nevertheless, primarily involved antitrust and related labor policies and basically a determination whether parties engaged in collective bargaining exceeded the scope of legitimate bargaining. We therefore recommended that the Commission find that the determination of this issue be left to the courts and the NLRB where there are pending three antitrust cases and one administrative proceeding. Should the courts and the NLRB ultimately find the agreements lawful and specific practices flowing therefrom raise specific and primary Shipping Act problems, then the Commission could determine the obligations of the parties under that Act with due consideration to labor policies.

The position as expressed above assumes that the allegations of the eight petitioning ports regarding a combination and conspiracy between the PMA and ILWU in restraint of trade are true in fact. If so, we submit, the agreements bear a striking resemblance to the situation in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), in which the court held an agreement between a group of employers and the mine workers' union to force terms and conditions of employment on other

employers outside of the immediate collective bargaining unit to be violative of the antitrust laws. Not surprisingly, as the reply memoranda of the PMA and ILWU indicate, the facts as to the existence of the alleged combination and conspiracy are vigorously disputed. Furthermore, the PMA and ILWU contend that the subject agreements were the product of intensive good-faith collective bargaining in which both the PMA and ILWU obtained desired benefits without any intention of eliminating competition from the petitioning ports.

II. THE CONTENTIONS OF THE PARTIES CON-FIRM THAT THE MATTERS IN QUESTION RAISE ISSUES WHICH ARE PRIMARILY ANTI-TRUST AND LABOR-RELATED IN NATURE AND SHOULD BE LEFT TO THE COURTS AND THE NLRB WHERE THEY ARE NOW PEND-ING.

We submit that the memoranda of the parties confirm the validity of our position. Thus, even if every question of fact is resolved in favor of the petitioning ports the activity complained of appears to constitute a classic antitrust violation in which the parties to collective bargaining have exceeded the scope of permissible bargaining by attempting to eliminate outside competition either by withholding labor or by forcing outside employers into PMA membership. As the ports summarize their contentions:

"The facts are clear that the Supplemental Memorandum imposes obligations upon the petitioner ports... to pay certain fringe benefits and, concurrently, to adhere to the labor policies of the PMA and accept all of the conditions of the new Coast Agreement even though to do so would result in abrogating existing labor contracts with locals of the ILWU which, because of differences in methods of operation, would be more costly to those ports than to other terminal operators in other localities." Ports' Memorandum, p. 19.

Again assuming that all the facts alleged by the ports are true, it would appear that the appropriate avenue of relief for the ports is in the area of antitrust law by means of injunctions, treble damages, etc. If, on the other hand, the PMA and ILWU are correct in their contention that their agreement is not directed against the ports but only against nonmember employers for valid reasons, and by lawful means, then it would appear that the parties have acted within the bounds of permissible collective bargaining, in which case, according to the Commission's decision in *United Stevedoring Corporation* v. Boston Shipping Association, the agreements would enjoy the so-called labor exemption from regulatory law.

An analysis of the contentions of the various parties demonstrates that the subject agreements essentially involve antitrust and labor-related matters. Thus, the PMA asserts that the matter of nonmember participation in PMA-ILWU programs has long been of concern of the PMA and ILWU. It is contended that nonmembers have enjoyed the benefits of the joint PMA-ILWU work force and other programs without incurring the same obligations as PMA members. It is further asserted that the SMU No. 4 (the Non-Member Participation Agreement) is merely designed to permit PMA members to compete on an equal basis with non-PMA member stevedores who enjoy longshoremen at industrial terminals and that the purpose and intent of SMU No. 4 is that non-member employers who wish to obtain a part of the industry-wide system of benefits which the PMA and ILWU have built up over the years should accept the responsibilities as do PMA members. The ILWU states that it believes this position of the PMA to be fair and concurs with the PMA that the entire matter was the subject of give-and-take bargaining between the PMA and ILWU, with both parties ultimately obtaining benefits, i.e. the PMA strengthening its multi-employer bargaining group and the ILWU seeking its goal of uniform contracts. The PMA finally contends that this type of agreement is akin to a "most favored nation" clause by which employers protect themselves against discriminatory treatment by unions with the sanction of the courts and the NLRB and adds that a mere coincidence of motives between the PMA and ILWU does not demonstrate a conspiracy in violation of the antitrust laws. The PMA concludes that the agreement is "intimately related" to the collective bargaining process and is a joint rather than an exclusive employer undertaking, and should therefore be left to the NLRB and the courts under the antitrust laws.

Of course, the ports dispute these facts, contending that the agreement is directed against them with severe anti-competitive effect as part of a longtime plan to force the ports into PMA membership or to subject them to PMA policies in derogation of their statutory obligations and local contracts with ILWU locals in the Pacific Northwest. The ports contend that they are willing to share in the PMA-ILWU programs as they have done in the past but that they are unable to comply with all the obligations of PMA members for a variety of reasons relating to their status under the law, local contracts, etc. The ports flatly label the SMU No. 4 as "compulsory unionism" i.e. an attempt by the PMA and ILWU to force them into PMA membership.

The Port of Seattle, an intervenor in this proceeding, contends that the PMA has for some time conducted a concerted campaign to have Seattle become a PMA member and alleges a "history of collusion" between the PMA and ILWU in furtherance of this objective. Seattle furthermore contends that both the PMA and ILWU have combined and conspired in restraint of trade in violation of the antitrust laws and states that "[t]he Port intends to vigorously press" the antitrust case it has brought before the U.S. District Court in Seattle. Although the Port contends that the Commission has jurisdiction over both the February 10 and April 25, 1972 agreements (i.e. the Memorandum of Understanding relating to container freight stations and the SMU No. 4) the Port asks the Commission to stay its proceedings with respect to the February agreement so that the Port may proceed to litigate its case before the court. As the Port states:

"Such a severance and postponement of the exercise of Commission jurisdiction will avoid unneces-

sary collisions with conflicting regulatory jurisdictions, will avoid multiplicity of actions, will avoid wastefullness inherent in multiple proceedings, and will not cause harm to a party, to the public interest or to the jurisdictional authority of the Commission." (Memorandum of Port of Seattle, p. 19).

Finally, the Port contends that should the Commission exercise its jurisdiction over the basic collective bargaining agreement (including the February agreement) the Commission would become involved in a time consuming and complicated undertaking involving such things as an inquiry into the good faith of the parties engaged in collective bargaining, whether particular provisions were mandatory subjects of bargaining, and various labor

policies of concern to the NLRB.

According to the Council of North Atlantic Shipping Associations (CONASA), another intervenor, the PMA-ILWU agreements were proper and mandatory subjects of bargaining involving fundamental union interests and were the result of intensive negotiations. Furthemore, CONASA contends, the agreements affecting non-members of the PMA are proper since they were designed to insure that the union will obtain its guaranteed benefits and to close a "gaping loophole" whereby "non-members of PMA enjoyed the benefits of the PMA-ILWU collective agreements but were not contractually bound by its obligations." (Memorandum of CONASA, p. 11). For these and other reasons CONASA contends that these matters should be left to the courts and the NLRB.

It is thus readily apparent, we submit, from a mere recitation of the various contentions of the parties, that the subject agreements and activities of the PMA and ILWU raise issues primarily of a labor and antitrust nature and that if the Commission pursued the investigation it would become enmeshed in areas foreign to its expertise. Furthemore, such an investigation would serve

<sup>&</sup>lt;sup>1</sup> CONASA makes a number of additional arguments which were raised by some parties and rejected by the Commission in the BSA case. These relate to the alleged lack of jurisdiction over the PMA as a "mixed membership" non-transportation entity.

to impede the parties seeking relief in the pending antitrust cases before the courts. We do not agree with the PMA that Commission jurisdiction must always be lacking in labor-related areas if the matter is "intimately related" to collective bargaining and is not exclusively reserved to employers. Nevertheness in this case, we submit, the central issue primarily concerns the scope of permissible collective bargaining rather than violations of the Shipping Act, an issue which the courts and the NLRB are well equipped to determine in the cases now pending before them.

# III. CONCLUSIONS

The position which Hearing Counsel have taken in this proceeding, we submit, has been amply validated by the various memoranda of the parties. Thus, it is our position that the activities and agreements of the PMA and ILWU which the petitioning ports and intervenor Port of Seattle contend are subject to the Commission's jurisdiction raise essentially antitrust and labor-related problems which should be resolved in the courts and before the NLRB where they indeed are now pending. It is readily apparent upon a reading of the various con-

tentions of the parties that the central issue relates to whether the parties to collective bargaining have exceeded the scope of permissible bargaining and have consequently violated the antitrust laws, very much as did the employers and union in *United Mine Workers* v. *Pennington*. Not surprisingly the relevant facts are vigorously disputed, the ports contending that the PMA and ILWU have conspired and combined to eliminate them from competition by forcing them into PMA membership and the PMA, ILWU, and other parties contending that the agreements were proper and lawful and designed to achieve legitimate employer and union goals.

No matter how the dispute in facts may be resolved, the entire matter primarily lies in an area foreign to the Commission's expertise. Therefore, we recommend that the Commission leave these matters to the courts and the NLRB who are well equipped to deal with them.

Respectfully submitted,

Donald J. Brunner, Director Bureau of Hearing Counsel Norman D. Kline Hearing Counsel

Washington, D.C. January 12, 1973

<sup>\*</sup> The PMA in effect collaterally attacks the Commission's decision in the BSA case in which the Commission enunciated several criteria as guidelines in determining whether a particular activity enjoyed the so-called labor exemption from antitrust or regulatory law. Instead the PMA offers its own simplistic standard. We submit, the Commission has considered the contentions of the PMA and numerous other parties in the BSA case regarding the proper standard to be employed and has found simplistic standards such as that now proposed by the PMA to be inadequate. Furthermore, contrary to the PMA's contentions, the Commission acted properly in enunciating its standards in the BSA case since this decision was responsive to the admonition of the U.S. Court of Appeals and the various parties who had opposed the Commission's previous decision on the ground that it had failed to consider or define the scope of the labor exemption. Significantly, another intervenor, the Council of North Atlantic Shipping Associations (CONASA) which otherwise agrees with the position of PMA, believes that the Commission properly looked to the antitrust cases for guidance in formulating its labor-exemption criteria. (See Memorandum of Law of CONASA, p. 18).

[Received Jan. 22, 1973]

AFFIDAVIT OF-FACTS OF PETITIONER PORTS RELATIVE TO REPLY TO MEMORANDUM OF LAW AND AFFIDAVITS OF FACTS OF P.M.A. AND I.L.W.U.

STATE OF OREGON )
COUNTY OF MULTNOMAH )

I, MILTON A. MOWAT, being first duly sworn upon oath depose and say: I am the Manager, Regulatory Affairs, of the Port of Portland, one of the petitioner ports. I make this affidavit on behalf of all of the petitioner ports in the interest of expedition and for the convenience of all parties concerned.

The matters set forth in this affidavit were supplied to me, at my request, by the cognizant officials of each individual port, for incorporation in this affidavit on

behalf of all petitioner ports.

The Legal Memorandum of P.M.A. states at the bottom of page 29 and top of page 30: "Moreover, as is shown in the affidavits of Mr. Flynn, Mr. Goodenough and Mr. Ward (Mr. Huntsinger), longshoremen and clerks are available to nonmembers outside of the joint work force, in the event nonmembers choose not to sign Supplement No. 4." Mr. Flynn said on Page 7 and Mr. Huntsinger on Page 3 of their affidavits that: "There are men who perform longshore and clerk functions who are not part of the registered I.L.W.U.-P.M.A. joint work force who are available to nonmembers who do not sign the Participation Agreement".

These statements are misleading at best. A substantial portion of the over \$5 million paid annually by the Northwest petitioner ports in I.L.W.U. payroll is for the services of skilled longshoremen such as straddle carrier drivers, lift truck drivers, Wagner log handler drivers and container, whirley and bridge crane operators. A longshoreman must be registered by the P.M.A.-I.L.W.U. before he would be considered for the training necessary

of this work force." PMA

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to qualify in one or more of these skill categories mentioned above. Therefore, the only longshoremen that could be available to nonmembers of P.M.A. would be casual, non-skilled longshoremen. The Northwest port petitioners are all operating ports. That means that they actually supervise and perform with I.L.W.U. labor the many marine terminal services that require the use of and skilled operators for the specialized equipment they own to efficiently handle marine cargo. If the petitioner ports were denied the skilled longshoremen they require marine commerce through these ports would stop to detriment of the P.M.A. vessel and stevedore members, the I.L.W.U. members, the ports and all those businesses and individuals whose livelihood depends upon the movement of ocean commerce through these ports.

It is stated on page 30 of the P.M.A. Legal Memorandum that: "The Nonmember Participation Agreement merely withholds men jointly trained and registered by P.M.A. and the I.L.W.U. from nonmembers who are unwilling to undertake the obligations incurred by P.M.A. tries to give the impression that only P.M.A. members have helped in the training of the I.L.W.U. work force. This is not true. The Port of Portland has and continues to make its container cranes, whirley cranes, water crane, mobile crane, straddle carriers and container lift trucks available to the P.M.A. and I.L.W.U. for the training of operators at a token charge of \$1.00 per hour.

The Legal Memorandum of P.M.A. on page 5 states in regard to the relationship between P.M.A. and petitioner ports that: "... it not only avails them of the P.M.A.-I.L.W.U. joint work force, but permits them to offer substantial welfare programs to their employees (with a minimum of expenditure on their part." (Emphasis supplied). Mr. Flynn said on page 8 of his affidavit that: "Such a nonmember has always paid (and is still paying since Supplement No. 4 is suspended) manhour dues which helps defray the cost, though not the entire P.M.A. cost, of dispatching hall and administration of the fringe benefit program." (Emphasis supplied). P.M.A. would like to give the impression that the petitioner ports are freeloaders when that is abso-

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lutely not the case. P.M.A. sets the rates for dues and assessments. If P.M.A. has not set the dues and assessments at a level high enough to cover their full cost they have no one to blame but themselves. Mr. Meyers, the treasurer of P.M.A., sets this issue to rest where he states on page 2 of his affidavit: "The Northwest Port Authorities are and have been paying P.M.A. manhour dues on the labor they employ because they use the joint P.M.A.-I.L.W.U. dispatch hall." They also pay into the various P.M.A.-I.L.W.U. fringe benefit funds in the same manner as P.M.A. members . . ." Emphasis supplied.

Mr. Flynn states further on page 8 of his affidavit that: "One of the obligations which petitioners object to is the provision of Article 6 that the nonmember participant shall pay to the P.M.A. 'an amount equal to the dues and assessments that a P.M.A. member would pay." This statement is totally untrue. Petitioner ports stated on page 15 in their Affidavits of Fact and Memorandum of Law dated December 12, 1972, that they: ". . . are perfectly willing to continue to share in the cost of the joint work force as do the members of P.M.A.; to share in the administrative costs of the I.L.W.U.-P.M.A. Pension Plan, the Welfare Plan, the P.M.A. Vacation Plans, and the I.L.W.U.-P.M.A. Guarantee Plans in accordance with the terms applicable to such participation, including making payments into such plans at the same rates and at the same times as members of the P.M.A. are required to make them; to use the P.M.A. central pay system and central records office and make payments of the amounts required thereunder at the same time and in the same manner as prescribed for members of P.M.A.

Dated this 12th day of January, 1973.

/s/ Milton A. Mowat MILTON A. MOWAT

Subscribed and sworn to before me this 12th day of January, 1973.

/s/ [Illegible]
Notary Public for Oregon
My Commission expires:
3/23/76

# BEFORE THE FEDERAL MARITIME COMMISSION

[Received Oct. 24, 1972]

[Caption Omitted]

# SUPPLEMENT TO ORIGINAL PETITION BY PETITIONER PORTS

Come now the petitioner ports and file this Supplemental Petition pursuant to Rule 502.70 and in support thereof respectfully represent and show:

I

Petitioner ports on July 25, 1972 filed a Petition for Investigation under Section 22 of the Shipping Act of 1916, alleging inter alia that the Pacific Maritime Association (herein called "PMA") and the International Longshoremen's and Warehousemen's Union (herein called "ILWU") had entered into a so-called Supplemental Memorandum of Understanding, dated April 25, 1972, and that the said Memorandum and practices proposed by the PMA and ILWU pursuant thereto were unlawful, detrimental to the commerce of the United States and the general public interest, unfair, unjust, discriminatory and unduly prejudicial to the petitioner ports and to individuals and business concerns interested in and dependent upon the petitioner ports.

II

Thereafter, and as a consequence of said Petition, the Federal Maritime Commission initiated proceedings which, if pursued, would have resulted in the requested investigation. The matter is now before the Commission

and a decision is pending with respect to jurisdictional issues; i.e., (1) whether the master collective bargaining agreement and the Supplemental Memorandum of Understanding No. 4 between the PMA and the ILWU embody any agreements between and among members of the PMA, which agreements are subject to the requirements of Section 15 of the Shipping Act of 1916; and (2) whether any labor policy considerations would operate to exempt these agreements or practices resulting therefrom from any provisions of Sections 15, 16 or 17 of the Shipping Act of 1916.

#### III

During the pendency of said proceedings, as mentioned above in Paragraph II, and on or about June 24, 1973, the PMA and ILWU entered into a revised version of Supplemental Memorandum of Understanding No. 4, a copy of which revision is attached as Exhibit "A" and made a part hereof. Said revised version of the Supplemental Memorandum is now a part of the current master collective bargaining agreement between the PMA and the ILWU. Said revised Supplemental Memorandum is implemented, by negative inference, by depriving longshore labor, longshoremen, clerks and walking bosses, of vacation, welfare, pension, pay guarantee, promotion, transfer, advancement in registered status, seniority and "all other aspects of [the employee's] work history as a member of the joint work force." This relegation to waterfront "purgatory" status is imposed by negative inference under the "NOTE" to Section 8 of the revised Supplemental Memorandum. Petitioner ports have at all times provided employees with all such benefits on the same basis as employers who are members of PMA and desire to continue providing all such benefits. This, of course, is in recognition of the single, indivisible work force which is available to Northwest ports, which work force is exclusively controlled by ILWU and PMA.

The revised version of the said Supplemental Memorandum does not and would not materially differ either in purpose or effect from the original Supplemental

Memorandum of Understanding No. 4. Said revised Supplemental Memorandum titled, "ILWU-PMA Nonmember Participation Agreement," imposes anticompetitive restrictions which are identical in effect to Supplemental Memorandum No. 4 upon Pacific Northwest ports, nonmembers of PMA, as a condition of utilizing the long-shore and related work force over which PMA and ILWU exercise monopoly control through exclusive joint registration procedures. More specifically, said revised Nonmember Participation Agreement purports to:

1. Require adherence of non-PMA members to all the terms of agreements to which they are not privy or parties as a condition to the availability of labor in the Northwest longshore industry. This is accomplished by denying access to the joint work force over which ILWU and PMA exercise exclusive control in such industry. There is no alternative source of manpower by reason of such exclusive control.

2. Require adherence to all provisions of agreements between PMA and ILWU with respect to the selection of men for inclusion in such work force, thereby perpetuating the monopoly control exercised by PMA and ILWU over the work force in West Coast shipping industry.

3. Require adherence by petitioners, notwithstanding their status as public ports and governmental subdivisions, to work stoppages as dictated by PMA by compelling what may be unlawful closure of all petitioner ports by reason of labor disputes to which they are not parties.

4. Require continued liability for PMA assessments, dues and other obligations notwithstanding denial, for unspecified reasons, of any right by petitioner ports to obtain longshore labor through established and customary dispatch procedures.

5. Require, through negative inference, petitioner ports to curtail or eliminate the established, customary employment of their own longshore employees who have been and are employed on a steady basis. The continued employment on a steady basis of such employees is es-

sential to the efficient operation of terminal facilities by

the Pacific Northwest ports.

6. Require non-PMA members, notwithstanding the unequal status and absence of participatory rights, to pay amounts equal to full PMA dues and assessments as a condition to the continued employment of labor in the Northwest longshore industry.

7. Require indefinite duration with respect to all the

foregoing.

8. Require continuing submission with respect to the foregoing, or such other conditions as might later be imposed by PMA, as a condition to the continued employment of labor in the longshore industry.

The revised version of the Supplemental Memorandum of Understanding No. 4 and the practices proposed by the PMA and the ILWU pursuant thereto would be as unlawful and detrimental to the commerce of the United States and the general public interest, unfair, unjust, discriminatory and unduly prejudicial to the petitioners and the individuals and business concerns which are interested in and dependent upon such ports, as the original Supplemental Memorandum No. 4. For the same reasons and upon the same grounds as set forth above and in the original Petition, such revised Supplemental Memorandum would constitute violations of Sections 15, 16 and 17 of the Shipping Act of 1916.

WHEREFORE, petitioners pray that the Federal Maritime Commission continue its investigation in the light of the revised version of the Supplemental Memorandum of Understanding No. 4 and that the relief prayed for in the original Petition be granted.

DATED this 18th day of October, 1973

Respectfully submitted,

DAVIES, BIGGS, STRAYER, STOEL AND BOLEY

By /s/ Harry R. Bullard Of Attorneys for Petitioners

WHITE, SUTHERLAND, PARKS & HEATH

By /s/ Alex F. Parks Of Attorneys for Petitioners

#### FEDERAL MARITIME COMMISSION

[Served January 30, 1974]

[Caption Omitted]

# SECOND SUPPLEMENTAL ORDER CONSOLIDATING JURISDICTIONAL ISSUES

This proceeding was instituted by Order of Investigation served September 6, 1972, to determine whether a master collective bargaining contract and a Supplemental Memorandum of Understanding No. 4, entered into by the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union (ILWU), embody any agreements between and among the members of PMA, which agreements are subject to the requirements of section 15 of the Shipping Act, 1916 (the Act): whether the implementation of these contracts by PMA and the ILWU will result in any practices which are violative of sections 16 and 17 of the Act; and finally whether there are any labor policy considerations which would operate to exempt such agreements or practices from any provision of the aforementioned sections of the Shipping Act, 1916.

The Commission's investigation was initiated at the request of several northwest ports,\* who maintain that the subject agreement, providing for the employment of long-shore labor, are "agreements" within the meaning of section 15 of the Act, which should have been filed for Commission approval pursuant to that section.

On October 19, 1972, in response to a petition filed by Hearing Counsel, we issued our First Supplemental Order Severing Jurisdictional Issues. In that order we agreed to decide separately the issue of the Commission's jurisdiction under section 15 over the subject agreements. Additionally, we agreed to consider whether any labor policy considerations would operate to exempt these agreements or the practices resulting from them from the provisions of section 15, 16 and 17 of the Act.

Petitioner ports have now submitted a revised version of the Supplemental Memorandum of Understanding No. 4 entitled "ILWU-PMA Non-member Participation Agreement" which, during the pendency of this proceeding, was made part of the master collective bargaining contract.

Upon a comparative reading of the "ILWU-PMA Non-member Participation Agreement", we find that this revised version is the same in all its substantive essentials as the Supplemental Memorandum of Understanding No. 4, the only difference between the two being that this revised agreement is embodied in the master collective bargaining agreement between PMA and ILWU. The Commission proposes to (1) grant the supplemental petition; and (2) include the "ILWU-PMA Nonmember Participation Agreement" in the current deliberations rising out of the First Supplemental Order.

However, the Commission desires that all interested parties be afforded the opportunity to show cause why the Commission should not proceed with its jurisdictional determinations.

THEREFORE, IT IS ORDERED, That the first ordering paragraph of the Commission's First Supplemental Order, served October 19, 1972 [and which amended the first opening paragraph of the Commission's Order of September 6, 1972], be amended as follows:

1. Whether the master collective bargaining contract entered into by PMA and ILWU embodies any agreements between and among the members of PMA, which agreements are subject to the requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814), and should be filed for approval under that section, or whether such agreements otherwise exist; and whether the master collective bargaining con-

<sup>\*</sup> The Ports of Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, Portland and Tacoma.

tract is itself an agreement subject to the requirements of section 15 and should be filed for approval;

4. Whether any labor policy considerations would operate to exempt the master collective bargaining agreement contract and/or any agreements embodied therein from any provisions of section 15 of the Act.

IT IS FURTHER ORDERED, That pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821), the first and fourth issues set forth in the first ordering paragraph of the amended First Supplemental Order of October 19, 1972, relating to application of section 15 to the subject agreement and operation of labor policy exemptions, be severed from the proceeding for expeditious determination by the Commission; and

IT IS FURTHER ORDERED, That there appearing to be no material issues of fact in dispute with regard to the purely jurisdictional issues arising under section 15, this phase of the proceeding shall be limited to the submission of affidavits and memoranda of law, replies, and oral argument. Should any party feel that an evidentiary hearing be required, that party must accompany any request for such hearing with a statement setting forth in detail the facts to be proven, their relevance to this issue in this phase of the proceeding, and why such proof cannot be submitted through affidavit.

Requests for hearing shall be filed on or before February 22, 1974. Simultaneous affidavits of fact and memoranda of law shall be filed by all parties no later than the close of business February 22, 1974. Reply affidavits and memoranda shall be filed by all parties no later than the close of business March 4, 1974. An original and 15 copies of affidavits of fact, memoranda, and replies are required to be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Copies of any papers filed with the Secretary should also be served upon all parties hereto. Time and date of oral argument, if requested and/or deemed necessary by the Commission, will be announced at a later date; and

IT IS FURTHER ORDERED, That notice of this order by published in the *Federal Register* and that a copy thereof and notice of hearing be served upon Petitioners and both the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their respective members; and

IT IS FURTHER ORDERED, That notice of this order and notice of hearing be mailed directly to the Department of Justice, the Department of Labor and the National Labor Relations Board; and

IT IS FURTHER ORDERED, That all future notices issued by or on behalf of the Commission with regard to this phase of the proceeding shall be mailed to Petitioners, the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their members, and any other person made a party hereof; and

IT IS FURTHER ORDERED, That any person other than those who are parties to Docket No. 72-48 who desires to become a party to this proceeding and participate herein, shall file a petition to intervene in accordance with Rule 5(1), 46 CFR 502.72, of the Commission's Rules of Practice and Procedure; and

IT IS FURTHER ORDERED, That the proceedings before the Presiding Administrative Law Judge be stayed pending determination of the severed issue by the Commission.

By the Commission.

/s/ Francis C. Hurney
FRANCIS C. HURNEY
Secretary

(Seal)

## BEFORE THE FEDERAL MARITIME COMMISSION

[Received Feb. 11, 1974]

#### PETITION OF WOLFSBURGER

[Caption Omitted]

# TRANSPORT-GESELLSCHAFT m.b.H. FOR LEAVE TO INTERVENE

Petitioner, Wolfsburger Transport-Gesselschaft m.b.H. ("Wobtrans"), respectfuly represents that it has a substantial interest in the matters in controversy in the above entitled proceeding and, pursuant to Rule 5(1) of the Federal Maritime Commission's Rules of Practice and Procedure (46 C.F.R. 502.72), petitions to intervene in, and become a party to, said proceeding. Set forth below are the grounds for the proposed intervention:

1. Wobtrans is a corporation organized and existing under the laws of the Federal Republic of Germany, with its principal place of business in Wolfsburg, Germany. It is engaged in the business of transporting vehicles to the Pacific Coast ports of the United States.

2. The vehicles transported by Wobtrans are discharged on the Pacific Coast by members of the International Longshoremen's and Warehousemen's Union ("ILWU").

- 3. The master collective bargaining contract and Supplemental Memorandum of Understanding No. 4 ("the Agreements") entered into by the Pacific Maritime Association ("PMA") and the ILWU affect Wobtrans' operation.
- 4. Wobtrans is one of the parties in Docket 73-34, Agreement No. T-2635-2, Final Pay Guarantee Plan, regarding the method by which moneys needed to discharge certain obligations under the PMA-ILWU collective bargaining agreements shall be raised. The issues presented in Docket 72-48, including the jurisdiction of the Commission over the Agreements, are simply other aspects of

the PMA-ILWU collective bargaining agreements affecting Wobtrans' discharge of vehicles.

5. Wobtrans' grounds for intervention are pertinent to the issues already presented and do not unduly broaden them. Intervention by Wobtrans will not unduly delay this proceeding.

WHEREFORE, petitioner requests that its petition to intervene be granted and that petitioner be treated as a party hereto, with the right to have notice of and appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel upon brief and at oral argument, if oral argument is granted.

Respectfully submitted,

WOLFSBURGER TRANSPORT GESELLSCHAFT m.b.H.

HERZFELD & RUBIN, P.C. Attorneys 40 Wall Street New York, New York 10005

By /s/ Cecelia Goetz CECELIA GOETZ

By /s/ Alan A. D'Ambrosio ALAN A. D'AMBROSIO

Dated at New York, New York February 7, 1974

# FEDERAL MARITIME COMMISSION WASHINGTON, D. C.

[Served February 25, 1974]

[Caption Omitted]

#### INTERVENTION GRANTED

Wolfsburger Transport-Gesellschaft m.b.H. (Wobtrans) has petitioned to intervene in this proceeding alleging an interest in the issues therein including the question of jurisdiction of the Commission over the agreements. Pacific Maritime Association objects to the petition.

Wobtrans appears to have a legitimate interest in this proceeding which should entitle it to participate therein. We are not unmindful of the lateness of the Wobtrans petition, but do not think their late participation will unduly delay the proceeding.

Accordingly, the petition to intervene is hereby granted.

By the Commission.

/s/ Francis C. Hurney
FRANCIS C. HURNEY
Secretary

# BEFORE THE FEDERAL MARITIME COMMISSION

[Received Mar. 11, 1974]

[Caption Omitted]

# AFFIDAVIT OF EDMUND J. FLYNN

STATE OF CALIFORNIA ) SS CITY AND COUNTY OF SAN FRANCISCO )

EDMUND J. FLYNN, being first sworn, deposes and says:

I am the President of Pacific Maritime Association (PMA), a maritime employers' collective bargaining association of steamship operators, terminals, stevedores and miscellaneous maritime companies, covering the entire United States Pacific Coast, except Alaska. As of March 14, 1973, one hundred twenty-six companies were members of PMA. On December 14, 1972, I submitted an affidavit in this proceeding. This affidavit is submitted in response to the Second Supplemental Order Consolidating Jurisdictional Issues, served by the Federal Maritime Commission on January 30, 1974, which refers to the non-member participation agreement, Section IX of the Memorandum of Understanding between PMA and the International Longshoremen's and Warehousemen's Union (ILWU), dated June 24, 1973.

The Commission's order states that the nonmember par-

ticipation agreement:

the Supplemental Memorandum of Understanding No. 4, the only difference between the two being that this revised agreement is embodied in the master collective bargaining agreement between PMA and ILWU.

This statement of the Commission is factually incorrect. Not only are there substantial differences between the present and the former agreement which make the present agreement less objectionable to the petitioner ports, but both agreements were embodied in the master collective bargaining agreement between PMA and the ILWU.

The collective bargaining history which resulted in Supplemental Memorandum of Understanding No. 4 was discussed in my previous affidavit and the affidavits of Mr. B. H. Goodenough, Vice President, Shoreside Labor Relations, PMA, submitted on December 14, 1972, and January 10, 1973, in this proceeding, and for this reason I do not believe it necessary to repeat the details of the negotiations between PMA and the ILWU which led to the final agreement. I wish to note, however, that at the conclusion of the 91 meetings prior to the signing of the Memorandum of Understanding on February 10, 1972, a copy of which is attached as Exhibit A, the nonmember participation question had not been resolved. This item, along with other items to which no specific cents/hour costs could be attached, was the subject of further negotiations between PMA and the ILWU, and ultimately resulted in Supplement No. 4, agreed to by PMA and the ILWU on April 25, 1972.

The collective bargaining negotiations conducted in 1973 resulted in the signing, on June 9, 1973, of a Memorandum of Understanding between PMA and the ILWU, a copy of which is attached as Exhibit B. As in the case of the 1972 negotiations, several items, including the non-member participation issue, were unresolved upon the signing of the Memorandum of Understanding on June 9, 1973. Subsequently, the unresolved items were negotiated between PMA and the ILWU, and agreement was reached on all such items. These unresolved items were incorporated into a Memorandum of Understanding, dated June 24, 1973, which also included the items previously agreed upon by PMA and the ILWU on June 9, 1973. A copy of the Memorandum of Understanding of June 24, 1973 is attached as Exhibit C.

There is no factual basis for the statement of the Commission that the present nonmember participation agreement is embodied in the master collective bargaining agreement, whereas Supplement No. 4 was not. Supplemental Memorandum of Understanding No. 4 is a supplement to-and a part of-the PMA-ILWU Memorandum of Understanding of February 10, 1972. This is obvious from its title, "Supplemental Memorandum", which speaks of itself. Supplemental Memorandum No. 4 is no less a part of the PMA-ILWU collective bargaining agreement than is the present nonmember participation agreement. Both agreements were the subject of collective bargaining between PMA and the ILWU, both were agreed upon during th bargaining at the end of the contract term, and both were executed by PMA and the ILWU. The sole difference in form (as distinct from substantive changes in provisions) is a typing job-on June 24, 1973, a single document was typed, which included all items, whereas on February 10 and April 25, 1972, two documents were typed.

I would also point out that the nonmember participation item was specifically referred to in the Memorandum of Understanding of February 10, 1972, as an item to be resolved between PMA and the ILWU by negotiation or mediation or, failing agreement by such means, by submission to the Coast Arbitrator for a final and binding

decision (Exhibit A, pp. 37-38).

This difference in form should certainly not control whether or not Supplemental Memorandum No. 4 was included in the PMA-ILWU collective bargaining agreement. For example, the Memorandum of Understanding of February 10, 1972 re-executed and amended the 1966-1971 Pacific Coast Longshore and Clerks Agreement (PCLCA) and the CFS Supplement (CFSS) (Exhibit A, pp. 1 and 21, et seq.) by reference thereto, but it did not physically embody those two agreements therein. It is as incorrect to state that Supplemental Memorandum No. 4 was not embodied within the PMA-ILWU collective bargaining agreement as it is to say that the PCLCA and the CFSS were not embodied therein. Such was never intended by PMA or the ILWU, and substance should not give way to mere form.

The Commission's assertion in its Second Supplemental Order, that the present nonmember participation agreement "is the same in all its substantive essentials as the Supplemental Memorandum of Understanding No. 4," is also incorrect. There are many significant differences between the two agreements. While neither PMA nor the ILWU believed Supplemental Memorandum of Understanding No. 4 was unlawful, a real effort was made during the negotiation of the present nonmember participation agreement to satisfy the objections raised by the nonmember ports as to the former agreement. As a result of this desire to resolve the basic objections of the nonmember ports, many substantive changes were made, all of which are evident from a comparison of the two agreements.

It is for this reason that PMA made no objection to the inclusion of the 1973 agreement in this proceeding. Supplemental Memorandum of Understanding No. 4 was never implemented by PMA and the ILWU, and has now been replaced by the 1973 agreement which answers many of the objections of the petitioner ports. In fact, these differences have apparently satisfied fully, Seattle's objections to the nonmember participation agreement.

For example-and very important-the note following paragraph 3b of the former agreement stated that if a nonmember participant had an agreement with the ILWU providing for the utilization of the jointly registered work force at more favorable terms and conditions of employment than those provided under the PCLCA, such nonmember was required to amend its agreement with the Union to conform to the PCLCA in order to become a nonmember participant. A principal contention of the petitioner ports as to the 1972 agreement was that Supplemental Memorandum of Understanding No. 4 represented an agreement or understanding between PMA and the ILWU that the Union, in its negotiation with nonmembers, must exact the same terms from nonmembers as it had obtained from PMA. There is no such agreement, as shown by my affidavit of December 14, 1972. The deletion of the note following paragraph 3b simply confirms that the ILWU is free to bargain with nonmembers on any basis it and the nonmembers may choose.

Another important change was the deletion of the last sentence of paragraph 6 of Supplemental Memorandum of Understanding No. 4, which provided that nonmember participants shall be liable to meet any obligations of PMA as to any collective bargaining and contracting relationship, including obligations accepted by PMA as imposed by law. The petitioner ports had contended that they would not undertake such obligations, and under the present agreement they are not required to do so. In fact, this change goes further than the ports had asked, because they were willing to assume such obligations to the extent that public bodies were able to do so.

In addition, paragraph 9 of Supplemental Memorandum of Understanding No. 4 was deleted. Paragraph 9 provided that should there be a cessation of work at the end of the contract period of the PCLCA and related agreements, the PMA labor policy shall continue to apply to nonmmeber participants, and nonmember participants shall continue to accept PMA's labor policy as their own. The deletion of this provision was made as the result of the petitioner ports' contention that they should not be required to adhere to PMA labor policies after the expiration of the ILWU-PMA collective bargaining agreement.

Furthermore, the rights of nonmembers in terminating the agreement have been changed. Former paragraph 13 stated that the agreement shall continue without a termination date unless jointly terminated by PMA and the ILWU. Present paragraph 12 now makes it clear that a nonmember participant may terminate the agreement on terms agreed upon by PMA, the ILWU and the nonmember. Such terms would only make it clear that the nonmember would no longer continue to receive the benefits and privileges which accrued to it while the nonmember was a signatory to the agreement.

As stated above, these significant changes have apparently satisfied Seattle's objections to the nonmember participation agreement. I discussed the changes with representatives of the Port of Seattle and they indicated an intention to dismiss the court action they have filed and

to take no further action in this FMC proceeding. It should be noted that Seattle has not joined in the supplemental petition of the petitioner ports.

I wish also to respond to the assertions made by the petitioner ports in their Supplemental Petition, dated

October 18, 1973.

The petitioners' statement in paragraph III that the present nonmember participation agreement "is implemented, by negative inference" is not correct. There has been no implementation of the nonmember participation agreement, directly, inferentially, or otherwise. As was the case of Supplemental Memorandum of Understanding No. 4, PMA and the ILWU have taken no steps to implement the nonmember participation agreement, pending the resolution of this proceeding before the Commission. The present nonmember participation agreement is simply the result of collective bargaining between PMA and the ILWU, but it has not been presented to nonmembers for their signature, nor has any action been taken by PMA or the ILWU to implement the agreement.

As to the numbered points made by the ports in paragraph III of their Supplemental Petition, I have the

following comments:

Item 1. The ports allege that the nonmember participation agreement requires the adherence of non-PMA members to all the terms of agreements to which they are not privy or parties as a condition to the availability of labor in the Northwest longshore industry. This contention is not factually correct. For example, the grain elevators in the Pacific Northwest have separate agreements with the ILWU, with wage classifications, wage rates and paid holidays different from those of the PMA-ILWU agreements. Furthermore, the ports' allegation that there is no alternative source of manpower to the ILWU-PMA jointly registered work force is not correct. Daily, at various ports, even PMA members use socalled casual workers who are not members of the jointly registered work force. Furthermore, from time to time the ports in Oregon obtain workers from the Oregon Unemployment Agency. The petitioner ports should be required to furnish affirmative evidence that they have tried to hire alternative workers and have been unable to do so.

If non-PMA members choose to do so they may become nonmember participants. However, nonmembers should not be able to take advantage of the benefits which PMA members obtain from the ILWU-PMA jointly registered work force, while rejecting the obligations which go with the benefits. The ILWU-PMA joint work force was established over 40 years ago and is an integral part of a jointly supported dispatch hall, a highly sophisticated central payroll and record keeping system, and a comprehensive program of fringe benefits negotiated by PMA and the ILWU, including a pension plan, a welfare plan, vacation allowance program, a Mechanization and Modernization Agreement, and, more recently, pay guarantee and paid holiday plans. These programs are vitally important to the work force, and their continued existence should not be endangered by permitting nonmembers of PMA to select which conditions they wish to abide by,

and which they will ignore.

It is no answer for the nonmember ports to assert that they are willing to contribute "their share" of the ILWU-PMA fringe benefits, because the inclusion in the joint work force of employees of nonmembers carries with it significant responsibilities for PMA which are not shared by nonmembers. The joint work force employees of a nonmember participant are entitled to all the benefits of the ILWU-PMA fringe benefit programs. If a nonmember leaves the industry its longshore employees must still be provided for, and it is the continuing obligation of PMA to do so. The jointly registered work force consists of a pool of workers registered, trained and benefited by PMA members, and PMA members continue to have obligations to this work force, regardless of the entry into and exit from the industry of nonmembers. For this reason a nonmember's "fair share" cannot be measured simply by whether it is willing to pay the latest welfare assessment paid by PMA members. A nonmember's fair share is measured by all of the obligations included in the nonmember participation agreement, not just a monetary contribution.

Item 2. The ports contend that the nonmember participation agreement requires adherence to the agreements between PMA and the ILWU in the selection of men for inclusion in the work force, thereby perpetuating monopoly control over the work force. Since it is a PMA-ILWU work force, PMA and ILWU should select the men, and if others choose to use the work force they should not be able to demand non-adherence to the agreements that govern the selection of the work force. If nonmembers do not agree with the manner in which the PMA-ILWU work force is selected, they have the right to negotiate their own separate work force with other unions, including the ILWU. If, however, nonmembers do not negotiate separate agreements with the ILWU and, instead, elect to utilize the joint work force of PMA and the ILWU, the nonmembers should not dictate the terms under which PMA and the ILWU select men for inclusion in the joint work force.

Item 3. The petitioner ports object to any adherence to "work stoppages as dictated by PMA." I wish first to note that PMA does not dictate work stoppages. Such incidents occur as a result of the failure of the parties to reach agreement on major items subject to negotiations. By law the Union has a right to strike and the employers have a counter-balancing right to lockout. I repeat that if nonmembers wish to bargain separately with any union for an agreement which treats labor disturbances in a different manner, nothing in the ILWU-PMA agreements prevents them from doing so.

If, however, nonmembers wish to utilize the jointly registered work force they should not be entitled to a favored position during labor interruptions. Indeed, the ports' position encourages, supports and condones partial divisive strikes by the ILWU, a most divestive tactic. It is well established that in such partial strike situations, a multiple-employer group can retaliate by a complete lockout. The ports' position would not permit PMA to use the full effectiveness of this recognized protective action because the ports are demanding that they be permitted to operate while PMA members are shut down. Thus, the petitioners want all of the benefits of the ILWU- PMA programs, but they also ask for freedom from the burdens imposed upon PMA members during periods of labor disturbance. In such times, petitioners want the competitive advantage of operating when all their com-

petitors cannot.

Item 4. The petitioners assert that the nonmember participation agreement requires continued liability for PMA assessments, dues and other obligations, notwithstanding denial "for unspecified reasons" of any right of the petitioner ports to obtain workers through the dispatch procedures. This assertion is incorrect. First, the assertion that there is "continued liability" implies that there is no time limit as to such liability. However, paragraph 4 of the nonmember participation agreement states that any liability of a nonmember participant, where it ceases to have the right to obtain men through the joint work force, shall continue only during the period of its participation in the use of the joint work force. It is only fair that nonmembers should not escape liabilities incurred by them during their use of the joint work force, merely because they no longer use the work force. Second, denial of the joint work force cannot be for "unspecified reasons." Paragraphs 7, 8, 9 and 10 of the agreement set forth in detail specific obligations, the noncompliance with which will render a nonmember delinguent.

Item 5. The petitioners allege that the agreement requires them "through negative inference" to curtail or eliminate steady employees. There is no inference, negative or otherwise, in the nonmember participation agreement to curtail or eliminate the employment of steady men. Paragraph 9.43 of the PCLCA states:

In addition to other steady employees provided for elsewhere in this Agreement, the Employers shall be entitled to employ steady, skilled mechanical or powered equipment operators without limit as to numbers or length of time in steady employment. They shall be entitled to the Contract guarantees as provided in Section 3. The employer shall be entitled to shift such steady men to all equipment for

which, in the opinion of the employer, they are qualified.

PMA members employ steady men, and so do the petitioner ports. The petitioner ports would continue to do

so on the same basis as PMA members.

Item 6. The petitioner ports object to the payment, "notwithstanding the unequal status and absence of participatory rights," of an amount equal to the dues and assessments paid by a PMA member. Any unequal status and absence of participatory rights is the petitioners' own choosing. They are free to become PMA members and participate with other members. However, if instead they choose to obtain all of the benefits of the jointly negotiated collective bargaining agreement but at the same time remain nonmembers, they should pay an amount equivalent to the dues and assessments of PMA members.

Item 7. The petitioner ports assert, incorrectly, that the nonmember participation agreement requires "indefinite duration" with respect to its obligations. The agreement has no such indefinite duration. As I stated above, under paragraph 12 a nonmember is free to terminate its participation at any time, on terms and conditions agreed by the nonmember, PMA and the ILWU. Such terms and conditions would only make it clear that the nonmember would no longer continue to receive the benefits and privileges which accrued to it while the

nonmember was a signatory to the agreement.

Item 8. The final contention of the petitioner ports is that the agreement requires submission to its terms, or such other conditions as might later be imposed by PMA, as a condition to the continued employment of labor. There is no provision in the nonmember participation agreement requiring continuing submission by nonmembers, nor is signing the agreement a condition to the continued employment of labor. The petitioner ports need not sign the agreement or continue their participation therein. I reiterate that they are free to employ workers through any alternative means they prefer, and to bargain with any union, including the ILWU, which may represent those workers. However, if they elect to

use the ILWU-PMA joint work force, they should do so on the same basis as PMA members. When a new collective bargaining agreement is negotiated, members are subject to any new terms negotiated. The same should be true of nonmembers as long as they remain participants in the various programs jointly instituted by PMA and the ILWU.

/s/ Edmund J. Flynn EDMUND J. FLYNN

Subscribed and sworn to before me this 1st day of March, 1974.

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/s/ Joan Fowler Notary Public

#### BEFORE THE FEDERAL MARITIME COMMISSION

[Received Mar 18, 1974]

[Caption Omitted]

## RESPONSE OF HEARING COUNSEL TO SECOND SUPPLEMENTAL ORDER CONSOLIDATING JURISDICTIONAL ISSUES

Petitioner ports have submitted a revised version of Supplemental Memorandum of Understanding No. 4 entitled "ILWU-PMA Non-Member Participation Agreement" which has been made part of the collective bargaining contract. In its Second Supplemental Order Consolidating Jurisdictional Issues, dated January 30, 1974, the Commission found

"[u]pon a comparative reading of the ILWU-PMA Non-Member Participation Agreement, . . . that this revised version is the same in all its substantive essentials as the Supplemental Memorandum of Understanding No. 4. The only difference between the two being that this revised agreement is embodied in the master collective bargaining agreement between PMA and ILWU."

PMA, however, in its Memorandum of March 1, 1974, filed in response to the Commission's Second Supplemental Order, argues that there are substantial differences between the original and revised non-member agreements. It appears to Hearing Counsel that the arguments of PMA go more to the merits of possible antitrust violations than the facts affecting the Commission's jurisdiction.

In response to the Commission's First Supplemental Order Severing Jurisdictional Issues, dated October 19, 1972, Hearing Counsel argued that the Arguments before the Commission essentially involved antitrust and labor-related problems which should be resolved in the Courts and before the NLRB. Having reviewed the revised ILWU-PMA Non-Member Participation Agreement, and

the Memoranda of the various parties, we find nothing which would change the position of Hearing Counsel as set forth previously, and we therefore incorporate by reference our Memoranda of Law dated December 15, 1972 and January 12, 1973.

Respectfully submitted,

Donald J. Brunner, Director Bureau of Hearing Counsel Paul J. Kaller Hearing Counsel

# BEFORE THE FEDERAL MARITIME COMMISSION

[Received Apr. 2, 1974]

[Caption Omitted]

# AFFIDAVIT OF EDMUND J. FLYNN

CITY AND COUNTY OF SAN FRANCISCO )
STATE OF CALIFORNIA ) 88

EDMUND J, FLYNN, being first sworn, deposes and says:

I am the President of Pacific Maritime Association (PMA), a maritime employers' collective bargaining association of steamship operators, terminals, stevedores and miscellaneous companies, covering the entire United States Pacific Coast, except Alaska. As president of PMA I submitted an affidavit dated March 1, 1974 in this proceeding. In that affidavit, among other matters, I stated that it was my belief that the 1973 revisions of the ILWU/PMA Nonmember Participation Agreement had satisfied Seattle's objections and that the Port of Seattle's representatives had indicated an intention to dismiss the court action involving that agreement and to take no further action in this FMC proceeding. My statement in this regard is based only upon discussion with representatives of the Port of Seattle but upon correspondence to which I now refer and attach copies.

Appendix A is a letter addressed to me from PMA's Seattle counsel in the antitrust suit. That letter dated September 20, 1973 states that the Port's attorney had indicated that the problems between the Port of Seattle, PMA, and ILWU may have been resolved by the terms of the new agreement. It asked for a copy of the new agreement so that it could be supplied to the Port's attorney.

Appendix B is a letter dated December 21, 1973 addressed to Mr. Goodenough, Vice-President of PMA, from Mr. Opheim, General Manager of the Port of Seattle, which encloses a copy of a letter of December 20, 1973 from Mr. Ford, Deputy General Manager of the Port of Seattle, to Mr. Crutcher, the Port's attorney. This letter is captioned:

"Re: Port of Seattle vs. PMA, ILWU, et al."

The letter expresses Seattle's wish to dispose of the captioned matter, suggests that a dismissal would be an appropriate way to handle it, and requests counsel to proceed accordingly.

I assumed that the caption included Seattle's participation in Docket 72-48 as well as the court suit and I was accordingly surprised when Seattle's attorney filed a further response in Docket 72-48 under date of March 12, 1974.

/s/ Edmund J. Flynn EDMUND J. FLYNN

Subscribed and sworn to before me this — day of March 1974.

/8/ Joyce M. Whitman

Notary Public

#### APPENDIX A

RIDDELL, WILLIAMS, VOORHEES, IVIE & BULLITT

Seattle-First National Bank Building Seattle 98154

September 20, 1973

[Sep. 24, 1973—E.I.F.]

Mr. Edmund J. Flynn, President Pacific Maritime Association 635 Sacramento Street San Francisco, California 94120

Re: Port of Seattle v. PMA and ILWU

Dear Ed:

One of the attorneys for the Port of Seattle contacted me the other day and stated that the problems between the Port and PMA and ILWU may all have been resolved by the terms of the new collective bargaining agreement between PMA and ILWU. He said that if this were so, the Port would probably be willing to dismiss its anti-trust lawsuit.

If you could send to me a copy of the new agreement, I would submit it to the attorneys for the Port to see if the new provisions might not wash out the Port of Seattle litigation.

Sincerely yours,

/s/ Donald Voorhees
Donald Voorhees

DV/cb

#### APPENDIX B

PORT OF SEATTLE P.O. Box 1209 Seattle, Washington 98111

[Received Dec. 24, 1973]

December 21, 1973

Mr. Ben H. Goodenough, Vice President Pacific Maritime Association P.O. Box 7861 San Francisco, California 94120

Dear Ben:

I believe you and Ed Flynn will be interested in the dismissal of the Port of Seattle suit, pursuant to the copy of a letter dated December 20, 1973 addressed to the legal firm retained by the Port of Seattle for this purpose.

Sincerely,

/s/ J. Eldon Opheim
J. ELDON OPHEIM
General Manager

pa

Encl. (1)

#### APPENDIX C

PORT OF SEATTLE P.O. Box 1209 Seattle, Washington 98111

[Received Dec. 24, 1973]

December 20, 1973

Mr. Michael B. Crutcher Preston, Thorgrimson, Ellis, Holman & Fletcher 2000 IBM Building Seattle, WA 98101

RE: Port of Seattle vs. PMA, ILWU, et al.

Dear Mike:

This will respond to your letter of December 11th concerning the Port's desire in the disposition of the abovecaptioned matter.

After substantial discussion here, it is our wish to have the case dismissed. We think that our relationships with the unions and with PMA requires us to finally dispose of this matter and a dismissal would be the appropriate way to handle it.

We ask that you proceed to accomplish this.

Very truly yours,

Richard D. Ford Deputy General Manager

rdf

cc: J. Eldon Opheim James D. Dwyer

9/05

# BEFORE THE FEDERAL MARITIME COMMISSION

[Received Apr. 3, 1973]

[Caption Omitted]

## AFFIDAVIT OF MILTON A. MOWAT

STATE OF OREGON	)
	) 88.
COUNTY OF MULTNOMAH	)

I, MILTON A. MOWAT, being first duly sworn upon oath depose and say: I am the Manager, Regulatory Affairs, of The Port of Portland, one of the petitioner ports. I make this affidavit on behalf of all of the petitioner ports in the interest of expediting this proceeding and for the convenience of all parties concerned.

Mr. Edmund J. Flynn, President of the Pacific Maritime Association, states on page 8 of his affidavit dated March 1, 1974:

"" Furthermore, the ports' allegation that there is no alternative source of manpower to the ILWU-PMA jointly registered work force is not correct. Daily, at various ports, even PMA members use so-called casual workers who are not members of the jointly registered work force. Furthermore, from time to time the ports in Oregon obtain workers from the Oregon Unemployment Agency. The petitioner ports should be required to furnish affirmative evidence that they have tried to fire alternative workers and have been unable to do so."

The Port of Portland does not, and has not in at least the past 20 years that we can speak of from first-hand experience hired any dockworkers from any source other than the ILWU hiring hall. Should the ILWU hiring hall exhaust the supply of registered longshoremen and still not fulfill the need for dockworkers on a given day, they will obtain and dispatch so-called casual men, men who are recruited and represented by ILWU but who are not registered longshoremen. It must be pointed out that any such casual men that are hired by the Port of Portland are hired exclusively through the ILWU hiring hall. We pay casual dockworkers the same wages and fringe benefits as registered dockworkers. We do not, nor could we, as Mr. Flynn incorrectly states, "obtain workers from the Oregon Unemployment Agency" or any other source whatsoever.

On March 13 and 14, 1974, I personally contacted responsible management personnel of the other petitioner ports, namely, Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, and Tacoma, and they state that all dockworkers they hire come from their respective ILWU hiring halls and not from any other source. The foregoing statements apply equally to these

ports.

The ILWU takes their jurisdiction of performing all dock work very seriously. They have repeatedly pressed this point with the Port of Portland and other petitioner ports to the end that if any cargo operation on the docks was performed by non-ILWU personnel, the goods would be considered "hot cargo" and ILWU personnel would refuse to handle that cargo. Illustrative is the fact that in 1968, the Port of Portland completed its new 35-acre automobile unloading and handling facility to handle the flow of imported motor vehicles previously handled at other Port of Portland facilities. Port Services, a private firm that performed auto cleanup and dealer preparation of imported vehicles at an off-dock location with other than ILWU workers, built the necessary facilities to perform these same services at a location adjacent to and separated by a road and fence from the vehicle storage area at the new auto facility but still on Port of Portland property. The ILWU claimed this work on the basis that it was then being performed on Port property even though they had not performed this work previously. When the work was not awarded to the ILWU by this other employer, ILWU called a strike which shut down the entire Port for approximately 26 days. The strike was resolved only when the other employer abandoned its new auto facility location and moved to an off-dock location.

Although the petitioner ports hypothetically may have "the right to negotiate their own separate work force with other unions," as stated by Mr. Flynn on page 9 of his affidavit, the petitioner ports agree that a work stoppage by ILWU personnel would certainly result should a port have any dock work performed by other than ILWU labor.

/s/ Milton A. Mowat MILTON A. MOWAT

Subscribed and sworn to before me this — day of March, 1974.

/s/ [Illegible]
Notary Public for Oregon

My commission expires:

# FEDERAL MARITIME COMMISSION WASHINGTON, D.C.

March 4, 1975

[Served March 4, 1975—Federal Maritime Commission]

[Caption Omitted]

# PROCEEDING HELD IN ABEYANCE PENDING JUDICIAL REVIEW

By report served January 30, 1975, the Commission concluded that the International Longshoremen's and Warehousemen's Union (ILWU)—Pacific Maritime Association (PMA) Nonmember Participation Agreement is subject to the jurisdiction of the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, 46 U.S.C. 814. The Commission also found that the said agreement is not "labor exempt." By order served January 30, 1975, the Commission ordered that the investigation proceed to determine the remaining specified issues and further ordered that a public hearing be held at a time and place to be determined by the Administrative Law Judge assigned to the proceeding.

By motion, PMA asks that any further investigation and hearing be held in abeyance pending judicial review of the Report and Order. ILWU joins in the motion. It is officially noticed that judicial review has been sought in Pacific Maritime Association v. Federal Maritime Commission, Docket No. 75-1140, United States Court of Appeals for the District of Columbia Circuit, Petition filed February 18, 1975. In its motion, PMA asserts that the agreement has never been implemented and will not be implemented, unless the Commission's jurisdictional decision is reversed by the Court, or, if not reversed, is approved by the Commission. PMA also points out that it would be inappropriate to proceed because the

particular agreement expires by its own terms on June 30, 1975, an event likely to occur prior to the time that judicial review runs its course.

Hearing Counsel does not oppose the motion. Other

parties have not replied to the motion.

Good cause having been shown, the motion is granted. The proceeding will be held in abeyance until judicial review is concluded.

/s/ Seymour Glanzer
SEYMOUR GLANZER
Administrative Law Judge

<sup>&</sup>lt;sup>1</sup> This proceeding was commenced before the effective date of the miscellaneous amendments to the Commission's Rules of Practice and Procedure 39 F.R. 33221, September 16, 1974. Nevertheless, the standard of amended Rule 5(a), 46 CFR 502.61,—"Hearing dates may be deferred by the presiding judge only to prevent substantial delay, expense, detriment to the public interest or undue prejudice to a party"—clearly has been met.

#### EXHIBIT A

# MEMORANDUM OF UNDERSTANDING between PACIFIC MARITIME ASSOCIATION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

Dated: February 10, 1972

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February 10, 1972

#### MEMORANDUM OF UNDERSTANDING

Between

PACIFIC MARITIME ASSOCIATION (For the Employers)

and

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

(For and on behalf of itself and each of its longshore locals and clerks locals in California, Oregon and Washington)

The 1966-1971 Pacific Coast Longshore and Clerks' Agreement shall be re-executed, as amended in the following particulars:

# APPLICABLE TO LONGSHORE AND CLERKS

# I. WAGES

Longshore

The basic straight time hourly rate for men paid on a six (6) hour day basis shall be increased by seventy-two cents (72¢) per hour effective 8:00 a.m. on December 25, 1971.

This brings the basic straight time rate to \$5.00 per

hour and the overtime rate to \$7.50 per hour.

Effective 8:00 a.m. on July 1, 1972 the basic straight time hourly rate for men paid on the six(6) hour day basis shall be increased by an additional forty cents (40¢) per hour. This brings the straight time rate to \$5.40 per hour and the overtime rate to \$8.10 per hour.

For special categories of longshoremen historically paid on an eight (8) hour straight time basis, the straight time hourly rate shall be increased as follows: Effective 8:00 a.m., December 25, 1971—81¢ Effective 8:00 a.m., July 1, 1972—45¢

Clerks.

II.

Effective 8:00 a.m. on December 25, 1971 the straight time hourly rate for clerks will be \$5.625 per hour and the overtime rate will be \$8.44.

Effective 8:00 a.m. on December 25, 1971 the straight time hourly rate for (clerk) supervisors will be \$6.19

and the overtime rate will be \$9.285.

Effective 8:00 a.m. on December 25, 1971 the straight time hourly rate for (clerk) chief supervisors and supercargoes will be \$6.87 and the overtime rate will be \$10.305.

Effective 8:00 a.m. on July 1, 1972 the straight time hourly rate for clerks will be \$6.075 and the overtime rate will be \$9.11; the straight time hourly rate for (clerk) supervisors will be \$6.68 and the overtime rate will be \$10.02; the straight time rate for (clerk) chief supervisors and supercargoes will be \$7.41 and the overtime rate will be \$11.115.

# PAY GUARANTEE PLAN

## Preamble

Guarantee benefits are designed to afford compensation to eligible employees whose earnings have been reduced below minimum levels, as herein defined, because of reduced work opportunities for such employees resulting from changed technology adopted by employers.

Guarantee benefits are not to compensate employees on account of reduced work opportunities caused by any economic decline in the Pacific Coast shipping industry and a resultant reduction in the amount of cargo tonnage handled during any period.

This Pay Guarantee Plan will be effective and payable at 36 straight time hours per week for A men and 18 straight time hours per week for B men beginning with the first regular payroll week after the

Parties reach agreement on eligibility and other rules required to administer the Plan and in accordance with the conditions hereinafter stated.

2.1 For the first 26 payroll weeks from the date of ratification the Employers shall have a contingent liability of 1/52 of \$5,200,000 for each payroll week to pay the weekly guarantee benefits described below.

For the second 26 payroll weeks the Employers shall have a contingent liability of 1/52 of \$5,200,000 for each payroll week to pay the weekly guarantee

benefits described below.

For the remainder of the Agreement term the Employers shall have a contingent liability of 1/52 of \$5,200,000 for each payroll week to pay the weekly guarantee benefits described below.

At the end of the first payroll week if the benefits that have been paid are less than \$100,000 the unused portion of the \$100,000 will be made available for the next payroll week. Thereafter, the unused portion of the total available in any payroll week shall be made available for the following payroll week. This accumulating procedure shall continue over the full contract period.

Contributions to this account, as determined by the Employers, shall be made by the Employers to meet guarantee payments for each payroll week period, except that the tax described in the CFS Supplement shall be used on a current basis as tax monies become available to offset the cost of the guarantee payments.

Individual hours and earnings will be calculated and averaged during each of the following periods.

- (1) For the first 26 payroll weeks from the first regular payroll week after the parties reach agreement on eligibility and other rules required to administer the Plan.
  - (2) For the next 26 payroll weeks.
- (3) For the remainder of the payroll weeks through June 30, 1973.

There shall be no carryover of individual accumulated hours and earnings from one period to the next.

3.1 For each payroll week the Employers shall make payments to registered A and B men as follows:

#### 3.2 A Men

The payment, if any, to each individual Class A longshoreman or clerk will be an amount to bring his total earnings for the payroll week to a dollar and cents figure equal to 36 hours at the straight time longshore rate subject to the conditions of Section 3.5.

A Class A man will not be paid under this provision if his paid hours for the payroll week were less than 80% of the average paid hours per man for the A men in his local for that payroll week; and a Class A man will not be paid under this provision if his total paid hours for each of the periods described in paragraph 2.1 are less than 80% of the average total paid hours per man for the A men in in his local for such periods.

Those A men who were paid less than 13 hours in the payroll week will be excluded with their hours from the calculation of such payroll week average in the first two described periods in Section 2.1; those men who were paid less than 11½ hours in the payroll week will be excluded with their hours from the calculation of such payroll week average in the remaining period.

An A man and his hours will be excluded from the calculation of the average for A men of the local for all the payroll weeks since the commencement of the 26 weeks period if, in the first 26 or the second 26 weeks, he was paid less than 13 hours times the number of payroll weeks; if in the remaining payroll weeks he was paid less than 11½ hours times the number of payroll weeks.

For A men, guarantee hours will not be counted as paid hours for the purposes of the three preceding paragraphs.

#### 3.3 B Men

The payment, if any, to each individual Class B longshoreman or clerk will be an amount to bring his total earnings for the payroll week to a dollar and cents figure equal to 18 hours at the straight time longshore rate subject to the conditions of Section 3.5.

A Class B man will not be paid under this provision if his paid hours for the payroll week were less than 80% of the average paid hours per man for the B men in his port for that payroll week; and a Class B man will not be paid under this provision if his total paid hours for each of the periods described in paragraph 2.1 are less than 80% of the average total paid hours per man for the B men in his port for such periods.

Those B men who were paid less than 7.25 hours in the payroll week will be excluded with their hours from the calculation of such payroll week average in the first two described periods in Section 2.1; those men who were paid less than 6.25 hours in the payroll week will be excluded with their hours from the calculation of such payroll week average in the remaining period.

A Class B man and his hours will be excluded from the calculation of the average for B men of the port for all the payroll weeks since the commencement of the 26 week period if, in the first 26 weeks or the second 26 weeks, he was paid less than 7.25 hours times the number of payroll weeks; if in the remaining payroll weeks he was paid less than 6.25 hours times the number of payroll weeks.

For B men, guarantee hours will not be counted as paid hours for the purposes of the three preceding paragraphs

Note: The Employers will submit to the Union an alternate plan for B men, integrating the payments under this Pay Guarantee Plan with State Unemployment Compensation Benefits. Such alternate plan shall provide for an income equivalent to 18 hours at the straight time rate as provided in the first paragraph of Section 3.3. If the parties agree on the alternate plan, it shall replace the B men plan described in Section 3.3.

3.4 A longshoreman's or clerk's earnings shall be the sum of all compensation received during the period, including such payments as straight time, overtime, penalty overtime, skill pay, penalty cargo pay, travel time pay, pay for vacations, and State Unemployment Benefits, and wage guarantee payments.

3.5 Payment for the first payroll week as determined in accordance with 3.2 and 3.3 will be based upon earnings during that payroll week. In the second payroll week, payments will be based on earnings for the first two payroll weeks for each individual.

For example, if during the first payroll week a Class A longshoreman's earnings are the equivalent of 40 straight time hours (4 hours of earnings over the guaranteed amount) he would carry a "credit" into the second payroll week of the earnings for those 4 hours. If his second payroll week earnings were equivalent to 34 straight time hours, the 4 hours' earnings overage from the first payroll week would be added to his 34 hours' earnings and he would not be eligible for any guarantee payments because over the two payroll weeks his earnings would have been two hours more than the guarantee for the two payroll weeks.

If his third payroll week earnings were equivalent to 34 straight time hours the two hours' earnings overage from the first two payroll weeks would be added to his 34 hours' earnings and he would not be eligible for any guarantee payments because, over the three payroll weeks, his earnings would have been equal to the guarantee for the three payroll weeks.

If his fourth payroll week earnings were equivalent to 32 straight time hours he would be eligible for four hours' guarantee payments because, over the four payroll weeks, his earnings would have been four hours less than the guarantee for the fourth payroll week. This accumulating process will continue until twenty-six payroll weeks have passed.

- 4.1 The Parties agree to continue the concept that mandatory retirement as spelled out in the Pension Plan may be invoked by joint action of the Parties. To make this concept meaningful, the Parties agree that if either Party believes mandatory retirement should be invoked the initiating Party shall bring the matter to the Joint Coast Labor Relations Committee. If agreement as to invocation and extent thereof cannot be reached, the matter shall be referred to the Coast Arbitrator for resolution and his decision shall be final and binding, provided the Arbitrator shall not change or alter the provisions of the Plan as written.
- 4.2 A longshoreman or clerk will not be paid under this Plan if he is eligible for normal retirement.
- 5. With the inception of the Guarantee Pay Plan the Parties agree that it is to their mutual best interest to prevent abuses of the intent and purpose of the Plan. The Parties further agree that it is not practicable to endeavor to define in advance all of the possible abuses that might occur or the actions that should be taken when abuses do occur. Therefore, the Parties agree that the following general principles apply:

(a) The Employers agree that they will not endeavor to develop rules or create situations which will in effect deprive men covered by this Agreement of benefits under this Plan to which they might normally be entitled.

(b) The Union agrees that neither it or any of its locals will act in such a manner as to evade the intent and purpose of Section 2.5 of the 1966-71 PCL & CD and thereby create situations where registered men would receive payments under this Plan to which they otherwise would not be entitled.

(c) The Union agrees that historically travel between ports has been an accepted and essential part of the Agreement, and that neither the Union or any of its locals will endeavor to create travel or nontravel situations which would result in payments under the Plan to which the registered men would not otherwise be entitled.

(d) If the registered work force of clerks in any local is exhausted on any dispatch, available registered longshoremen shall be offered the work before casual clerks are employed. Failure of a registered longshoreman to accept such dispatch shall make him

ineligible for benefits for that payroll week.

(e) Within a period of 10 days following the Union Caucus' approval of the Agreement, the Parties will develop the necessary rules to deal with the situations specifically covered in (a) (b) (c) and (d) above as well as on any administrative matters they believe need resolution for effectuation of the purposes and interests of this Plan. If within 10 days they cannot reach agreement they will submit their respective positions and disputes to the Coast Arbitrator and his decision shall be final and binding.

(f) A work stoppage by any local in violation of Section 11.1 of the PCL & CD shall disqualify all registered men in the port from payment under this Plan in the payroll week that the violation occurs.

In the event that unions other than those signatory to this Agreement have work stoppages or there occurs an Act of God (described herein as "force majeure") that creates a reduction in tonnage handled in a port, area, or on a coastwise basis, for a period extending beyond one payroll week, the Employers will present to the Union their evaluation of the tonnage lost. If agreement as to the tonnage loss is reached, the parties will then determine the amount of reduction if any of the Guarantee payments. Such reduction will apply only to the port or ports affected by work stoppage or Act of God. There shall be no reduction in the amount of the Employers' contingent liability arising out of instances covered by this paragraph. If the Parties fail to reach agreement on the reduction of tonnage, or the reduction of

guarantee payments, or both, the issue(s) shall be referred for resolution to the Coast Arbitrator.

- 7. Disputes arising over the interpretation or application of the terms of the Pay Guarantee Plan shall be referred direct to the Joint Coast Labor Relations Committee and if resolution cannot be reached there the issue(s) shall be presented to the Coast Arbitrator whose decisions will be final and binding.
- 8. Operational improvements as a result of technological changes may bring about greater than anticipated losses in work opportunity for longshoremen and clerks. Should such losses of work opportunity require Pay Guarantee Plan payments in excess of the contingent liability amounts set forth in Section 2.1, the Union may, at the Joint CLRC level, request the Employers to increase their contingent liability. If disagreement is reached, the Union may submit the dispute to the Coast Arbitrator who shall have the authority to increase the Employers' contingent liability provided

(a) he has first satisfied himself that the parties have conformed with the specific terms and conditions of the Pay Guarantee Plan which they have established to prevent gimicking and abuses and to provide for mandatory retirement to reduce Em-

ployer liability.

(b) he is limited to increasing the Employers' contingent liability on a prospective basis and for a period of no more than four (4) weekly payroll periods. On this item it is understood that if at the end of the four weekly payroll periods the normal contingent liability figure would still be inadequate, the Arbitrator has the authority to extend the increased amount for another period of not more than four (4) payroll weeks and continuing four (4) week periods thereafter.

If at the end of any such four (4) payroll week period for which, through arbitration, the Employers' contingent liability figure has been increased it becomes evident that work opportunity has improved so that the \$100,000 weekly contingent liability figure is adequate, the Employers shall then be obligated only for the \$100,000 weekly contingent liability figure so long as that figure is adequate.

The Arbitrator shall not have the right to increase the Employers' contingent liability because of lost work opportunity due to economic decline.

#### III. PENSIONS

1. An employee who retired prior to July 1, 1966 with a Basic Monthly Benefit shall receive a Basic Monthly Benefit of \$300 effective July 1, 1971. An employee who retired prior to July 1, 1966 with a Reduced Basic Benefit or a Disability Pension will have his bene-

fit increased proportionately.

2. An employee who retired after June 30, 1966 and before July 1, 1971 shall receive a Basic Monthly Benefit of \$300 effective with his sixty-first monthly pension payment. An employee who retired between June 30, 1966 and July 1, 1971 with a Reduced Basic Benefit or a Disability Pension will have his benefit increased proportionately effective with his sixty-first pension payment.

3. An employee who retires on or after July 1, 1971 at age 62 or older with 25 years of service out of 35 will receive a Basic Monthly Benefit of \$350, and a Supplemental Monthly Benefit of \$150, which Supplemental Monthly Benefit shall be payable only until attainment of age 65. Any employee who retires on or after July 1, 1971, at age 65 with less than 25 years of service, shall receive a pro rata benefit based on normal pension of \$350. Any employee retiring on or after July 1, 1971 on Disability Pension shall receive benefits proportional to the Basic Monthly Benefit received for normal retirement, or pro rata retirement benefit as appropriate.

4. Employees who have completed 25 years of service out of 35 years may retire at or after age 59 with a benefit until age 65 having an equivalent actuarial value to the Basic Monthly Benefit and the Supplemental Monthly Benefit otherwise payable at age 62, and at age 65 and thereafter with a benefit having an equivalent actuarial value to the Basic Monthly Benefit.

5. Effective January 1, 1973, employees who attain age 65 and are entitled to retire with either a Basic Monthly Benefit or a Reduced Basic Benefit shall be required to retire. Employees now registered who first became eligible to receive any immediate pension benefit subsequent to age 65 but not later than age 68 shall be required to retire when first eligible for a pension.

6. Longshoremen and clerks with 13 or more years of service and having attained age 55 may leave the industry with the pension benefit to be the full dollar benefit accrued to date with payment deferred until age 65. An employee with 25 or more years of service who elects to leave the industry at or after age 55 with pension payments deferred until age 65, shall only receive a Basic Monthly Benefit of \$350, or an immediate pension having an equivalent actuarial value to the amount of pension payable at age 65.

7. The pension benefit improvements set forth in paragraphs 3, 4 and 6 shall become effective with the first regularly scheduled pension payment date occurring 1 month after the date of ratification of the agreement.

# IV. WELFARE

1. Present medical coverage under the Welfare Plan shall be maintained during the term of the Agreement with the Employers guaranteeing maintenance of benefits.

2. Hospital and medical benefits in small ports will be brought up to a level as close as possible to the large port plans.

3. Dental coverage under the Welfare Plan shall be as

follows:

Dependent children up to the age of 15 shall continue to receive the schedule of dental benefits they now receive. Employees and dependents including children over age 15 and under age 19 entitled to benefits under the Welfare Plan shall receive 73% of the agreed to scheduled dental benefits.

4. Prescription drugs (Kaiser Plan IV or comparable) for welfare eligible retirees, eligible employees and dependents subject to a \$1.00 deductible for each pre-

scription.

5. \$10,000 life insurance and \$10,000 accidental death and dismemberment insurance shall be provided to fully registered active longshoremen and clerks with at least five qualifying years of service who are eligible for welfare coverage on date of death or accident. In the event of the death of a longshoreman or clerk, benefits under this provision shall be payable only to the surviving spouse or dependent children, if any, who are not eligible for any benefits under the Pension Plan. If this insurance benefit is payable, then the Life Insurance and Accidental Death and Dismemberment benefits provided for elsewhere in the Welfare Agreement will not be payable.

6. Retirees welfare coverage will be extended to those retiring under the Pension Agreement at age 59 or later

with 25 years of service.

7. Indemnity Plan. Longshoremen and clerks, eligible for Welfare benefits, who are injured in the course of their employment under the Agreement and who as a result of such injury become entitled to Workmen's Compensation will receive an amount equal to the difference between \$125 per week and the weekly Workmen's Compensation payment the longshoreman or clerk is entitled to receive.

Note: The Parties agree that this Indemnity Plan will not be implemented until the Parties have jointly developed and agreed to the necessary rules for administration. If the Parties fail to reach agreement on such rules within thirty days from the ratification by both Parties, the disputed issues will be submitted to the Coast Arbitrator and his decision shall be final and binding.

8. The foregoing welfare benefit improvements shall become effective one (1) month after the date of ratifica-

tion of the Agreement.

9. Revise 7.2 of the Welfare Agreement as follows in order to include hours paid under the Pay Guarantee Plan in meeting the requirements for welfare eligibility:

a) Sentence to be inserted as a new paragraph immediately after 7.21.

"For the purposes of this 7.21, hours paid under the 'Pay Guarantee Plan' to Employees with limited Registration shall be deemed to be hours worked."

b) Sentence to be inserted as a new paragraph immediately prior to the last paragraph in 7.22.

"For the purposes of this 7.22, hours paid under the 'Pay Guarantee Plan' to Employees with limited Registration shall be deemed to be hours worked."

10. Employees, or their beneficiaries, whose death or disability benefits were reduced as a result of the Sixth Amendment to the M & M Agreement, shall receive the total amount of benefits payable without regard to the Sixth Amendment.

#### V. CFS SUPPLEMENT

# A. SECTION 1-SCOPE OF WORK

1. Amended Section 1.1 as follows:

"1.1 The stuffing and unstuffing of containers by Container Freight Station Utilitymen and Container Freight Station Clerks in a Container Freight Station (hereinafter referred to as a CFS) is work covered by this Supplement."

2. Delete subsection 1.13, and renumber subsection

1.14 to 1.13.

3. Delete subsections 1.5, 1.51, 1.52, 1.53, 1.531, 1.532, 1.533, 1.534, 1.54, 1.541, 1.542 and 1.543 and substitute the following:

"1.5 Containers, Zones and Container Tax. The provisions of this section are intended to protect and preserve the established work of employees covered by the PMA/ILWU Pacific Coast Longshore & Clerks Agreement and this CFS Supplement at docks or areas adjacent thereto.

"1.51 Containers defined. For the purposes of this section, the term 'container' means a single rigid, non-

disposal dry cargo, insulated, refrigerated, flatrack, vehicle rack, portable liquid tank, or open-top container. All types of containers will have constructions, fittings, and fastenings able to withstand, without permanent distortion, all the stresses that may be applied in normal service use of continuous transportation, and shall have minimum total outside dimensions of 8' x 8' x 8' and have an opening or permanently hinged door (s) that allow ready access to the cargo space.

"1.52 Zones defined. There shall be two defined zones as follows:

"1.521 First, there shall be a zone in each port to be known as the 'Waterfront Zone.' Except for the San Francisco Bay Area and the Los Angeles/Long Beach Harbor, the 'Waterfront Zone' in all ports shall include any area which is within one (1) mile of any present or future waterfront 'dock' as defined in Pacific Coast Longshore and Clerks Agreement. The 'Waterfront Zone' in the San Francisco Bay Area and the Los Angeles/Long Beach Harbor shall be as follows:

# San Francisco Bay Area:

Beginning at a point at the southern end of the Golden Gate Bridge; proceeding on Highway 101 to Marina Blvd.; then to Cervantes, then to Bay St.; then to Columbus; then to Broadway; then to Sansome; following Market St. to Third Street southward to the old Bayshore Highway back to Highway 101; from Highway 101 southward to Randolf Ave.; then to Chestnut Ave.; then to El Camino Real continuing southward to Santa Clara; at this point continuing eastward to Alum Rock Ave.; then turning northward on Capitol Ave. to Highway 680; northward on Highway 680 to Highway 238 into Hayward; then to Mission Blvd. to East 14th Street in San Leandro; along East 14th St. northward into Oakland turning on to San Pablo Avenue; following San Pablo Avenue through Albany, the city of San Pablo and through Pinole to Highway 80; eastward along Highway 80 to Highway 4 continuing on to the Antioch Bridge; then northward along Highway 160 to Highway 12 into Fairfield; on to Highway 80, then continuing westward on Highway 80 to American Canyon Road to Highway 29; southward to Highway 37; westward to Highway 101; then southward to the Golden Gate Bridge and the completion of the circle."

# Los Angeles/Long Beach Harbor:

Beginning at the point where Western Avenue meets the sea; then north on Western Avenue to Pacific Coast Highway; east on Pacific Coast Highway to Atlantic Avenue; south on Atlantic Avenue to the sea. (Further, it is agreed: (1), that any area within the Port Area CFS Zone which is now or in the future under the control of a Habor Department shall be treated as being within the Waterfront Zone and (2), that should Anaheim Bay/Seal Beach be expanded into a commercial dock facility, the Waterfront Zone shall at such time be re-defined by the parties.)

"1.5211 It is recognized that in some ports and areas it may be impossible or impractical for a PMA member to operate a CFS within the confines of the Waterfront Zone. In such cases a PMA member shall be permitted to locate a CFS outside of the Waterfront Zone but within the Port Area CFS Zone and such CFS shall be treated as being within the Waterfront Zone for purposes of this CFS Supplement.

"1.522 Second, there shall be a zone known as the Port Area CFS Zone. This shall include an area of 50 miles radius from each dispatch hall in each port covered by the PMA-ILWU Agreement.

"1.53 Container Tax. Except as provided below, all cargo in containers, as defined in Section 1.51, which is loaded aboard or discharged from vessels will be assessed a tax of \$1.00 per long ton of 2,240 pounds. Such tax shall be collected and be used as an offset toward the cost of the Pay Guarantee Plan, with surplus, if any to be used to reduce unfunded past service Pension liability.

"1.531 The tax described in Section 1.53 shall not apply to:

"(a) Cargo in containers stuffed or unstuffed by ILWU labor employed by PMA members under terms of

the PCL & CA or this CFS Supplement.

"(b) Cargo in outbound containers originating outside of any Port Area CFS Zone or cargo in inbound containers destined for delivery outside of any Port Area CFS Zone.

"(c) Cargo in containers originating within or destined for delivery within any Port Area CFS Zone to or from retail or wholesale warehouses, factories, or processing plants.

"(d) Household goods in containers which are stuffed

or unstuffed by a moving company.

"(e) Cargo in containers moving coastwise or intercoastal. 'Coastwise' means the West Coast of the North American Continent.

"(f) Cargo in containers stuffed or unstuffed in the 'store door' method of pick-up or delivery in the 'domestic trade.' 'Store door' method is defined to mean the stuffing or unstuffing of cargo into or out of containers at one or more wholesale or retail warehouses, factories, or processing plants when pick-up or delivery service is the responsibility of the Ocean Carrier. 'Domestic trade' includes intercoastal, West Coast of the continental United States including Alaska, Hawaii, Guam, Puerto Rico, and any other U.S. insular possession.

"(g) Cargo in containers which are trans-shipped and

where the tax has been paid once.

"1.54 Containers originating in or destined for delivery within a Port Area CFS Zone, which are to be loaded on or have been discharged from a non-PMA member steamship company vessel, shall be stuffed or unstuffed by ILWU labor employed by an employer signatory to the PCL & CA or this CFS Supplement, unless cargo in such containers has tax-free status under Section 1.531(c) through (g).

"1.55 Containers originating at or destined for delivery to a non-PMA member facility employing ILWU labor within the Port Area CFS Zone shall be stuffed or unstuffed by ILWU labor employed by an employer signatory to the PCL & CA or this CFS Supplement, unless cargo in such containers has tax-free status under Section 1.531(c) through (g).

"1.56 Where there is a jurisdictional problem between two segments of the ILWU having to do with stuffing and unstuffing of containers, containers will be discharged or loaded without a tax and as directed by the employer without interference by the ILWU, and the ILWU will be responsible for solving its own jurisdic-

tional problems.

"1.57 Effective on the date of ratification of the new PCL & CA Agreement, of which this is a Supplement, PMA members shall discontinue their past practice of subcontracting of stuffing or unstuffing of containers in the Waterfront Zone or the Port Area CFS Zone by employers not parties to this Agreement. Such subcontracting practices may continue during the period legally required by the subcontract plus any additional time required to build, expand, lease, equip or provide facilities to be operated within the Waterfront Zone under the Agreement. During such period containers may be received from or delivered to such subcontractors without tax, but such tax-free period shall not extend beyond 90 days from date of ratification of this Agreement. Each company having subcontracts will promptly notify PMA of the date it will be operating under this Agreement, and such information will be furnished to the Union. Facilities built, leased, or expanded or provided under this subsection will be within the designated Waterfront Zone.

"1.58 If the ILWU (Longshore/Clerks Division—the International or local) has negotiated or negotiates a CFS contract with a PMA member or nonmember with terms and conditions dealing with the handling of containerized cargo that are more favorable to said member or nonmember than the terms and conditions of this CFS Supplement or the PCL & CA, such contract shall be available to PMA members operating under this CFS Supplement or the PCL & CA.

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## B. SECTION 4-WAGES

Amend subsections 4.11 and 4.12 as follows:

"4.11 CFS utilitymen and CFS clerks: Effective 8:00 a.m. December 25, 1971 the rate shall be \$5.625 and effective 8:00 a.m. July 1, 1972 the rate shall be \$6.075. "4.12 Working supervisory CFS clerk: Effective 8:00 a.m. December 25, 1971 the rate shall be \$6.19 and effective 8:00 a.m. July 1, 1972 the rate shall be \$6.68.

C. SECTION 9—GRIEVANCE PROCEDURE
Delete subsections 9.12 and 9.13.

# D. SECTION 12—HEALTH AND WELFARE AND PENSIONS AND M&M

 Change the heading of this section to read, "SEC-TION 12—HEALTH, WELFARE AND PENSIONS."

2. Delete subsections 12.5 and 12.6.

E. Time worked under this Contract Supplement by any CFS employee shall count as time worked as a longshoreman or clerk under the ILWU-PMA Pension Plan, and the Guarantee Plan for A and B registered longshoremen and clerks.

# VI. SUBSISTENCE AND LODGING

Section 6.5. Amend by increasing the lodging allowance from \$5.00 per night to \$8.00 per night for long-shoremen and from \$6.50 per night to \$9.50 per night for clerks. Amend by increasing the meal allowance from \$2.00 per meal to \$3.00 per meal for both long-shoremen and clerks.

# VII. DISPATCHING, REGISTRATION AND PREFERENCE

A. Section 8.36. Add a new section as follows:

"8.36 The parties at the Coast Labor Relations Committee level shall establish a work force adjustment pro-

cedure for any port which becomes a 'low work opportunity port.' Such procedure shall include matters such as transfer conditions, method of selecting men for transfer to another port, and qualification status for payments under the 'Guaranteed Work Opportunity Plan.'

"8.361 A port shall be considered a 'low work opportunity port' when the average hours of the port for a six-month consecutive period are below two-thirds of the

coastwise average hours.

"8.362 As soon as a port becomes a 'low work opportunity port,' the Coast Labor Relations Committee shall, as provided in Section 8.36, meet promptly. If the Coast Labor Relations Committee is unable to agree on a work force adjustment procedure the matter shall be submitted to the Coast Arbitrator within 30 days for decision."

# VIII. HEALTH AND SAFETY AND PENALTY CARGO

The Parties agree to refer to a joint subcommittee the task of updating the existing Pacific Coast Marine Safety Code and the Penalty Cargo List, with a six-month time limit after the new Agreement becomes effective to accomplish their assignment. The penalty cargo rates shall not be subject to change.

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# APPLICABLE ONLY TO LONGSHORE

#### I. SKILL DIFFERENTIALS

The skill differential rates in Section 6.33 shall be increased as follows:

15¢ per hour increased to 25¢ per hour

20¢ per hour increased to 35¢ per hour

30¢ per hour increased to 50¢ per hour

40¢ per hour increased to 70¢ per hour

#### II. 9.43 MEN

1. Retain present Section 9.43 and interpretations except as modified by 2 below.

2. Add a new Section 9.431 as follows:

"(A) Steady skilled men cannot be assigned to operate winches.

"(B) Steady skilled men cannot be assigned to operate basic fork lifts up to five-ton capacity except under the following circumstances:

"a) To fill out the 8-hour guarantee;

"b) To move equipment around incidental to their other duties."

3. Equalization of hours and methods of dispatching and definition of basic fork lift shall be worked out at the local level, or settled by the Coast Arbitrator no later than five days after adjournment of Coast Caucus if Caucus approves contract as recommended by Negotiating Committee.

# III. OTHER CATEGORIES OF STEADY MEN

The Employers assume that all other categories of steady men such as gearmen, sweepers, utility lift drivers, crane operators, coopers, etc., will return to their former steady employment if requested by their Employers.

Any question that may develop over the application of this provision shall be settled in accordance with the agreement on 9.43 men, specifically paragraph 3.

# APPLICABLE ONLY TO CLERKS

# I. SAFETY TRAINING

Safety and first aid training shall be provided by the Employers to Supercargoes or Supervisors who wish to qualify to render first aid, subject to the parties at the local level determining the extent, necessity, number of men, selection of men, and implementation of such training.

# II. EMPLOYMENT OF SUPERCARGO

Add a new sub-section 1.2541 as follows:

"At those locations and under those conditions where a PMA vessel is required to employ a Supercargo, a nonmember vessel will not be worked by a PMA member unless the nonmember vessel employs a Supercargo."

#### III. SHELTERS

The question of the necessity of providing adequate stationary or mobile dock shelters for the performance of clerks' paper work on docks controlled by PMA Employers is referred to the parties at the local level. The Union shall submit to the Employers at the local level, within sixty (60) days, a list of the locations where they believe such shelters are necessary. The parties shall then survey such locations and endeavor to reach a determination as to the necessity of providing shelters. If agreement cannot be reached, the matter shall be referred to the Area Arbitrator for determination.

The Union shall not be precluded from raising the question of the necessity of providing adequate stationary or mobile dock shelters within sixty (60) days at dock locations not presently in operation.

When a PMA employer works at a dock not controlled by a PMA member, the PMA employer will endeavor to work out at the local level any question raised as to the necessity of providing an adequate place to work at such location.

# GENERAL PROVISIONS APPLICABLE TO THE PACIFIC COAST LONGSHORE AND CLERKS AGREEMENT

- (A) Travel Time. The Employers will not be foreclosed from requesting further discussion on the subject of existing travel time and pay.
- (B) Lawsuits. All PMA lawsuits against the ILWU or any of its locals are dropped and all lawsuits of the ILWU or any of its locals against PMA or its member companies are dropped.
- (C) M&M. Delete from Section 21 the references to "Mechanization and Modernization Plans."
- (D) Items Referred to Mediation/Arbitration. If the Parties are unable to resolve the following items by further negotiation or mediation, they shall be submitted for resolution to the Coast Arbitrator whose decision shall be final and binding:

1.	Hours	PMA Proposal 4/8/71 ILWU 11/16/70 (Extended Shifts)
2.	Grievance Machinery	ILWU Proposal 8/26/71 PMA Proposal 8/30/71
3.	Stop Work Meetings	PMA Proposal 8/30/71
4.	High Piling	PMA Proposal 9/21/71
5.	Scope of Work	Contract coverage on in- dustrial docks; teamsters unloading trucks on dock; log assembly ILWU Proposal 8/26/71
6.	Manning	L.A.S.H., Seabee, RO/RO to be the same as East Coast manning; other manning as per ILWU Proposal 8/26/71 PMA Proposal 5/7/71
7.	Clerks' Jurisdiction	ILWU Proposal 2/5/71

8.	Local negotiations	ILWU Proposal 1/16/72 PMA Proposal 1/17/72		
9.	PMA Demands			
	a) Nonmember participation	PMA Proposal 4/8/71		
	b) Protection against dis- patch law suits	PMA Proposal 4/8/71		
	e) Gear Priority	PMA Proposal 4/8/71		
	d) Skill Rate Application	PMA Proposal 9/21/71 ILWU Proposal		
10.	Training	ILWU Proposal 11/16/70		
11.	Amend Crane Supplement	ILWU Proposal 11/16/70 PMA Proposal 4/8/71		

(E) Effective Date. All amendments to the ILWU-PMA 1966-1971 Pacific Coast Longshore and Clerks Agreement contained in this Memorandum of Understanding shall become effective following ratification by both parties, unless specified otherwise in this Memorandum of Understanding or unless specified below:

## a) Retroactive Wage Payments

Retroactive wage adjustments shall be paid to individuals, on the basis of their payroll hours, as soon as practical after government approval is obtained but in no event later than six weeks thereafter. Payments will be made at such time for the following periods:

(1) December 25, 1971 until the beginning of the payroll week following ratification—during this period retroactive pay shall not include skill differentials or subsistence and lodging.

(2) From the beginning of the payroll week following ratification until the payroll week following government approval when the negotiated increases are paid on a current basis—during this period retroactive pay shall include skill differentials and subsistence and lodging increases.

(F) Ratification. This Memorandum of Understanding is subject to ratification by both Parties.

- (G) Government Approval. This Memorandum of Understanding and all local agreements are subject to the approval of agencies of the United States having jurisdiction over pay and price increases. Such applications for approval by government agencies shall be made after resolution and ratification of this Memorandum of Understanding and all local agreements in all ports, within five (5) days following ratification. In the event that necessary government agency approvals are not obtained within thirty (30) days after the filing of applications, either party may give written notice of cancellation in which event this Memorandum of Understanding and all local agreements shall expire unless new agreements are negotiated within such period, or approval is attained. Each Party agrees to cooperate fully with the other with respect to the making and processing of any applications which may be required by law.
- (H) IRS Approval. Implementation of the Pay Guarantee Plan, Pension Plan improvements, and Welfare improvements are subject to and conditioned upon the Commissioner of Internal Revenue determining that each of said Plans meets the requirements of the Internal Revenue Code relative to same, and that contributions to the Plans will be or will continue to be deductible for Federal Income Tax purposes.
- (I) Term of Agreement. Amend Section 20.1 by changing the termination date to 8:00 A.M., July 1, 1973.

Dated: February 10, 1972

PACIFIC MARITIME ASSOCIATION on behalf of its members:

/8/ B. H. Goodenough

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington:

/s/ Harry Bridges

# FIRST AMENDMENT to the MEMORANDUM OF UNDERSTANDING

Dated 2/10/72

between

# INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

and

# PACIFIC MARITIME ASSOCIATION

The Pacific Maritime Association and the International Longshoremen's Union agree to the following amendment of the Memorandum of Understanding between them dated February 10, 1972.

Paragraph (G) of the section titled, "General Provisions Applicable to the Pacific Coast Longshore and Clerks Agreement" is amended in its entirety, and shall read:

"(G) Government Approval. This Memorandum of Understanding is subject to the approval of agencies of the United States having jurisdiction over pay and price increases.

"If satisfactory government agency approval for pay and price increases are not obtained by May 8, 1972, either party may at any time thereafter give written notice of cancellation, in which event this Memorandum of Understanding shall expire. "Should such notice of cancellation be given, the parties shall meet immediately for the purpose of negotiating a new Memorandum of Understanding."

DATED: April 14, 1972

PACIFIC MARITIME ASSOCIATION on behalf of its members:

/s/ Ed. J. Flynn President

> INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

/s/ Harry Bridges President

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#### SECOND AGREEMENT to the MEMORANDUM OF UNDERSTANDING

Dated 2/10/72

between

# INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

and

#### PACIFIC MARITIME ASSOCIATION

The Pacific Maritime Association and the International Longshoremen's Union agree to the following amendments of the Memorandum of Understanding between them dated February 10, 1972.

- 1. Section I, titled "Wages," is amended
  - a. In the first paragraph under the heading "Long-shore" by deleting "seventy-two cents (72¢)" and substituting therefor "forty-two cents (42¢)":
  - In the first paragraph under the heading "Clerks,"
     by deleting \$5.625" and "\$8.44" and substituting therefor "\$5.29" and "\$7.935," respectively; and
  - c. In the remaining paragraphs under the hearings "Longshore" and "Clerks" and in Section V, B, Section 4 "WAGES" by making additional wage rate changes required by the amendments in "a" and "b" immediately preceding.
- 2. Paragraph (E) (a) (2) of the section titled "General Provisions Applicable to the Pacific Coast Longshore and Clerks Agreement" is amended by deleting "following government approval" and substituting therefor "beginning June 3, 1972."
- 3. Paragraph (I) of the section titled "General Provisions Applicable to the Pacific Coast Longshore and Clerks Agreement" is amended in its entirety, and shall read:

"I. Term of Agreement. Amend Section 20.1 by changing the termination date to 8:00 A.M., July 1, 1973, provided:

a) if U.S. government wage or price controls are eliminated on or before November 30, 1972, either party may give sixty (60) days' written notice of cancellation after the date of elimination of controls in which event

this Memorandum of Understanding shall expire;

b) notwithstanding a) above, if U.S. government wage or price controls are not in effect on January 31, 1973 or if U.S. government wage or price controls are eliminated on or after January 31, 1973 either party may give twenty-four (24) hours' written notice of cancellation after the date of elimination of controls in which event this Memorandum of Understanding shall expire;

c) should notice of cancellation be given, the parties shall meet immediately for the purpose of negotiating

a new Memorandum of Understanding:

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

/s/ Harry Bridges President

Dated: May 11, 1972

PACIFIC MARITIME ASSOCIATION on behalf of its members:

/s/ Ed. J. Flynn President February 22, 1972

#### NO. 1 SUPPLEMENT MEMORANDUM OF UNDERSTANDING

The "Memorandum of Understanding" between the Parties dated February 10, 1972 spells out in Item (D) of "General Provisions Applicable To The Pacific Coast Longshore and Clerks Agreement" a listing of eleven (11) items to be resolved by further negotiation, mediation or arbitration.

This "Supplemental Memorandum of Understanding" covers understandings reached by the Parties on February 20, 1972 with respect to certain of those eleven items as indicated below.

# Item 8-Local Negotiations

(a) In those areas or ports where local negotiations have not been concluded, the local Parties shall continue such negotiations until April 30, 1972. If, on that date, there are remaining unresolved issues, such issues shall be either dropped or submitted to the Area Arbitrator, provided the local Parties mutually agree to refer such unresolved issues to the Area Arbitrator. The Area Arbitrator shall render his decision on the unresolved issues no later than May 10, 1972.

(b) Until such time as all local issues in a port are concluded as in (a) above, the terms and conditions of all local Agreements which were in effect on June 30, 1971 shall remain in effect. When all local issues are resolved as provided in (3) above, the terms and conditions of such revised Agreements shall be placed into effect.

(c) The provisions of (a) and (b) above do not apply to those issues settled by the local Parties or the Coast Arbitrator under Item II "9.43 men" and Item III "Other Categories of Steady Men" of the February 10, 1972 Memorandum of Understanding.

Item 9(d)—Skill Rate Application

PMA withdraws its proposal of September 21, 1971 and the Union withdraws its proposal of November 16, 1970, both proposals pertaining to the application of skill rate differentials.

This means that the negotiated skilled rate differentials will be applied to the skills as presently contained in Section 6.33 of the PCLCD. By applying the skill rate differentials on this basis, the Parties agree that there remains one unresolved issue which will be settled by the Coast Arbitrator, i.e., the application of skill differential rates to the categories of "Gang Boss" and "Hatch Boss Tender."

# Item 11-Amend Crane Supplement

The Parties reviewed PMA's proposal of April 8, 1971 and the Union's proposal of November 16, 1970, both relating to the Crane Supplement and agreed that, since these matters are being discussed in local negotiations, they will be held over at the Coast negotiating level pending the outcome of local negotiations.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

/8/ Wm. T. Ward

Dated: February 22, 1972

PACIFIC MARITIME ASSOCIATION on behalf of its members:

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March 1, 1972

# NO. 2 SUPPLEMENTAL MEMORANDUM OF UNDERSTANDING

The "Memorandum of Understanding" between the Parties dated February 10, 1972 spells out in Item (D) of "General Provisions Applicable to The Pacific Coast Longshore and Clerks Agreement" a listing of eleven (11) items to be resolved by further negotiation, mediation or arbitration.

This "Supplemental Memorandum of Understanding" covers an understanding reached by the Parties on March 1, 1972 with respect to one of those eleven items as indicated below.

# Item 9(d)-Skill Rate Application

The Supplemental Memorandum of Understanding dated February 22, 1972 states "there remains one unresolved issue which will be settled by the Coast Arbitrator, i.e., the application of skill differential rates to the categories of 'Gang Boss' and 'Hatch Boss Tender'." The Parties agree that this issue is now resolved by application of the skilled differential rates as follows:

	So. Cal.	No. Cal.	Ore.	Wash.
Gang Boss Hatch Boss Tender(2)	.40(1)	.35	.35	.35

- (1) Applifes to Pt. Hueneme only.
- (3) Applies to Tacoma, Anacortes and Port Angeles only.

#### Vacations

In the context with the intent of the Parties in negotiating the Pay Guarantee Plan, the parties hereby agree that section 7.21 of the Pacific Coast Longshore & Clerks Agreement shall be amended as follows:

"7.21 Qualifying hours for vacation purposes shall include all hours for which pay is received, except vacation hours and 'Pay Guarantee Plan' hours."

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

/s/ Wm. T. Ward

Dated: March 1, 1972

PACIFIC MARITIME ASSOCIATION on behalf of its members:

April 24, 1972

# NO. 3 SUPPLEMENTAL MEMORANDUM OF UNDERSTANDING

The "Memorandum of Understanding" between the Parties dated February 10, 1972 spells out in Item (D) of "General Provisions Applicable To The Pacific Coast Longshore and Clerks Agreement" a listing of eleven (11) items to be resolved by further negotiations, mediation or arbitration.

This "Supplemental Memorandum of Understanding" covers understandings reached by the Parties with respect to two of those items as indicated below.

# Item 4—High Piling

The Parties agree that this item is resolved by the following understanding:

A. Delete Appendix I "Standard Maximum Sling Loads" and amend Section 1.24 to read as follows:

"1.24 Any load of cargo discharged from a vessel may, in whole or part, be rearranged if necessary for dock storage. Such cargo shall not be considered high piled unless stored more than two loads high."

B. Add a new Section 1.241 as follows:

"1.241 Newsprint in rolls shall not be considered high piled unless stored more than two high, except that half size rolls (36" or less in height) shall not be considered high piled unless stored more than four high." Item 10-Training

The Union agrees to drop its proposal of November 16, 1970.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

/s/ Wm. T. Ward

Dated: April 24, 1972

PACIFIC MARITIME ASSOCIATION on behalf of its members:

# NO. 4 SUPPLEMENTAL MEMORANDUM OF UNDERSTANDING

The "Memorandum of Understanding" between the Parties dated February 10, 1972 spells out in Item (D) of "General Provisions Applicable To The Pacific Coast Longshore and Clerks Agreement" a listing of eleven (11) items to be resolved by further negotiations, mediation or arbitration.

This "Supplemental Memorandum of Understanding" covers an understanding reached by the Parties with respect to one of those items as indicated below.

# Item 9(a)—Nonmember Participation

The parties agree that this item is resolved by an agreement reached on a new "ILWU-PMA Nonmember Participation Agreement," which is quoted below:

# QUOTE:

# ILWU-PMA NONMEMBER PARTICIPATION AGREEMENT

The PMA-ILWU jointly registered work force (hereinafter referred to as the "joint work force") exists as a result of the registration process beginning in 1935 under successive Pacific Coast Longshore and Clerks Agreements (herein called "PCLCA") and the Walking Bosses and Foremen's Agreement. These agreements have been between the Pacific Maritime Association and its predecessors (PMA) and the International Longshoremen's and Warehousemen's Union and its longshore, clerks and walking bosses/foremen's locals in California, Oregon and Washington (ILWU). The men in the joint work force have "jobs" in which they work on an interchangeable basis for the many business entities involved in or related to the movement of cargo to and from ships in California, Oregon and Washington. Some of these

business entities are not members of PMA. The following provisions apply to such nonmembers of PMA.

1. A business entity not a member of PMA must participate in this ILWU-PMA Nonmember Participation Agreement if it uses men in the joint work force.

2. The nonmember participant's separate ILWU contract must conform with the provisions hereof, and the provisions of the PCLCA governing the selection of men

for inclusion in the joint work force.

3. A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA. The nonmember participant shall obtain men, units of men and gangs of men through the allocation system operated by PMA, from the dispatching halls operated jointly by ILWU and PMA. If a nonmember participant obtains men within the joint work force other than through the allocation system or the dispatching system referred to herein, such nonmember participant shall thereafter be disqualified from use of the joint work force, subject to the conditions of paragraph 11 of this Nonmember Participation Agreement.

a. A nonmember participant may obtain and employ a man in the joint work force on a steady basis in the same way a member may do so. When such participant employs a man to work on a steady basis, it shall notify PMA immediately. On request from PMA, each such participant shall furnish to PMA a list of men it is using on a steady basis. Steady men shall participate in the Pay Guarantee Plan in accordance with the rules that are

adopted by PMA and ILWU.

b. For purposes of 1.53 through 1.57 of the Container Freight Station Supplement (CFSS) of the PCLCA, a nonmember participant who uses the joint work force at terms and conditions of employment no more favorable to the nonmember participant than those provided under the PCLCA, including the CFSS, may be deemed to be a "member of PMA" insofar as it is so using the joint work force.

Note: If a prospective nonmember participant has an agreement with the ILWU which provides for utilization of the joint work force at terms and conditions of

employment more favorable to the nonmember than those provided under the PCLCA, including the CFSS, such nonmember must alter that agreement to conform to the PCLCA, including the CFSS, in order to become a

nonmember participant.

4. The nonmember participant shall participate in the ILWU-PMA Pension Plan, the ILWU-PMA Welfare Plan, the PMA Vacation Plans (longshoremen and clerks, and walking bosses/foremen) and the ILWU-PMA Guarantee Plans (longshoremen and clerks, and walking bosses/formen) in accordance with the terms applicable to such participation. Such nonmember shall make payments into these Plans at the same rates and at the same times as members of PMA are to make the respective payments. Attached are statements of terms and conditions currently in effect with respect to such participation. Nonmember participants shall be subject to the same audits as members of PMA.

5. The nonmember participant shall use the PMA central pay system and central records office and must sign the standard forms of participation documents for the central records office and central pay system. Amounts due with respect to the central pay and central records system shall be paid to PMA at the time and in the man-

ner prescribed for members of PMA.

Note: The hours for which pay is distributed through the central pay office to any man within the joint work force, with respect to his being used by such nonmember pursuant to the terms hereof, shall be deemed hours of work for a PMA member company for purposes of determining the individual longshoreman's eligibility for vacations, welfare, pensions, pay guarantee, promotion, transfer, advancement in registered status, seniority, and all other aspects of his work history as a member of the joint work force.

6. Each nonmember participant shall pay to the PMA an amount equal to the dues, and assessments, that a PMA member would pay. Payments shall be made at the time the member would pay. Each nonmember participant shall be liable proportionately to meet any obligations of PMA or of the PMA membership with respect

to any PMA action in the PMA-ILWU collective bargaining and contracting relationship that is covered by the terms hereof, including obligations accepted by PMA as being imposed by law.

7. If a nonmember participant becomes delinquent under paragraphs 4, 5, or 6 hereof no joint work force workers shall be furnished to the delinquent nonmember.

8. In case a labor dispute arises and there is a stoppage of the work that normally would be done under the PCLCA and the Walking Bosses and Foremen's Agreement, the nonmember participant shall be governed by the labor policy in regard to that work stoppage that is fixed by PMA in compliance with its By-Laws and to which notice thereof is given in writing to the nonmember

participant by PMA.

9. Should there be a cessation of work at the end of the contract period of the PCLCA and the Walking Bosses and Foremen's Agreement, or thereafter while negotiations are continuing toward a renewal or substitute contract, the PMA labor policy as to what work shall be done and under what terms and conditions shall apply to each nonmember participant the same as it applies to PMA members provided written notice thereof is given by PMA to the nonmember participant. The nonmember participant so notified shall accept the PMA labor policy in regard to such situation as its labor policy.

10. A nonmember participant who carries on work during any work stoppage within the PCLCA or the Walking Bosses and Foremen's Agreement contract period or during any post-contract strike or lockout in knowing violation of any labor policy of PMA referred to in paragraphs 8 through 9 hereof shall thereby terminate its right thereafter to obtain any workers from the joint work force. Any hours worked contrary to PMA labor policy during the period of any stoppage, strike or lockout covered by paragraphs 8 or 9 hereof shall not be considered as hours worked for purposes of vacation, welfare, pension, seniority, availability for dispatch, etc.

11. Should any nonmember participant cease to have the right to obtain men through the allocation and dis-

patching system, such nonmember shall nevertheless continue under a duty to meet all of its obligations based upon its use of the joint work force including accrued obligations for PMA assessments and dues, obligations for retroactive and current assessments for fringe benefits, obligations to meet liabilities under paragraph 7 hereof, and all other obligations with respect to the pay of workers paid through the central pay office during the period of its participation in the use of the joint work force.

12. It is believed that all provisions of this agreement are now lawful, and it is assumed that they will continue to be lawful. Should there at any time be a determination that any portion of this agreement is contrary to law, the remaining provisions shall continue to be binding upon the parties unless ILWU or PMA gives notice of the termination of this entire agreement.

13. The ILWU-PMA Nonmember Participation Agreement shall be binding and continue in effect without a terminal date, unless jointly terminated by the PMA and ILWU. An entity may terminate its participation only on such terms and conditions as may be mutually agreed to by the PMA, the ILWU and the participant. An entity that terminates its participation shall at such time no longer be eligible to employ men in the joint work force nor to participate in the Pension, Welfare, Vacation

and	Pay	Guarantee	Plans	existing	between	ILWU	and
PM/				DOM:			

Dated: ———	Agreed to by:
	(Participant)
	Ву

Approved by

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

Approved by PACIFIC MARITIME ASSOCIATION, on behalf of its members

UNQUOTE.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington:

/s/ Wm. T. Ward

Dated: April 25, 1972

PACIFIC MARITIME ASSOCIATION, on behalf of its members:

May 12, 1972

#### NO. 5 SUPPLEMENTAL MEMORANDUM OF UNDERSTANDING

In conformity with the wage rate adjustments provided in the Second Amendment to the Memorandum of Understanding, dated May 11, 1972, this Supplemental Memorandum of Understanding amends the wage rate sections of the "Memorandum of Understanding dated February 10, 1972" as follows:

#### I. WAGES

"Longshore

"The basic straight time hourly rate for men paid on a six(6) hour day basis shall be increased by forty-two cents (42¢) per hour effective 8:00 a.m. on December 25, 1971.

"This brings the basic straight time rate to \$4.70 per

hour and the overtime rate to \$7.05 per hour.

"Effective 8:00 a.m. on July 1, 1972 the basic straight time hourly rate for men paid on the six (6) hour day basis shall be increased by an additional forty cents (40¢) per hour. This brings the straight time rate to \$5.10 per hour and the overtime rate to \$7.65 per hour.

"For special categories of longshoremen historically paid on an eight (8) hour straight time basis, the straight time hourly rate shall be increased as follows:

"Effective 8:00 a.m., December 25, 1971—47.5¢ "Effective 8:00 a.m., July 1, 1972—45¢

"Clerks

"Effective 8:00 a.m. on December 25, 1971 the straight time hourly rate for clerks will be \$5.29 per hour and the overtime rate will be \$7.935.

"Effective 8:00 a.m. on December 25, 1971 the straight time hourly rate for (clerk) supervisors will be \$5.815 and the overtime rate will be \$8.72.

"Effective 8:00 a.m. on December 25, 1971 the straight time hourly rate for (clerk) chief supervisors and supercargoes will be \$6.465 and the overtime rate will be \$9.70.

"Effective 8:00 a.m. on July 1, 1972 the straight time hourly rate for clerks will be \$5.74 and the overtime rate will be \$8.61; the straight time hourly rate for (clerk) supervisors will be \$6.31 and the overtime rate will be \$9.465; the straight time rate for (clerk) chief supervisors and supercargoes will be \$7.005 and the overtime rate will be \$10.51."

#### V. CFS SUPPLEMENT

#### "B. SECTION 4-WAGES

"Amend subsections 4.11 and 4.12 as follows:

"4.11 CFS utilitymen and CFS clerks: Effective 8:00 a.m. December 25, 1971 the rate shall be \$5.29 and effective 8:00 a.m. July 1, 1972 the rate shall be \$5.74. "4.12 Working supervisory CFS clerk: Effective 8:00 a.m. December 25, 1971 the rate shall be \$5.815 and effective 8:00 a.m. July 1, 1972 the rate shall be \$6.31."

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

/s/ Wm. T. Ward

Dated: May 12, 1972

PACIFIC MARITIME ASSOCIATION on behalf of its members:

/s/ B. H. Goodenough

June 2, 1972

# NO. 6 SUPPLEMENTAL MEMORANDUM OF UNDERSTANDING

The "Memorandum of Understanding" between the Parties dated February 10, 1972 spells out in Item (D) of "General Provisions Applicable To The Pacific Coast Longshore and Clerks Agreement" a listing of eleven (11) items to be resolved by further negotiation, mediation or arbitration.

This "Supplemental Memorandum of Understanding" covers understandings reached by the Parties with respect to two of those items as indicated below.

Item 2—Grievance Machinery

Both parties agree to drop their "grievance machinery" proposals.

Item 5—Scope of Work

The Union agrees to withdraw this item from the mediation/arbitration procedure. These jurisdictional matters are to be subsequently resolved by the Parties on a case-by-case basis.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

/s/ Wm. T. Ward

Dated: June 2, 1972

PACIFIC MARITIME ASSOCIATION on behalf of its members:

/s/ B. H. Goodenough

# NO. 7 SUPPLEMENTAL MEMORANDUM OF UNDERSTANDING

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The "Memorandum of Understanding" between the Parties dated February 10, 1972 spells out in Item (D) of "General Provisions Applicable To The Pacific Coast Longshore and Clerks Agreement" a listing of eleven (11) items to be resolved by further negotiation, mediation or arbitration.

This "Supplemental Memorandum of Understanding" covers understandings reached by the Parties with respect to several of those items as indicated below.

Item 1-Hours

Both parties agree to drop their proposals on "Hours."

Item 9(b)—Protection Against Dispatch Law Suits

The parties agree that this item is resolved by inclusion of the following new language in the "grievance machinery" of Section 17 of the Pacific Coast Longshore and Clerks' Agreement.

"Any dispute in which the Association or the Union asserts that any dispatching hall is dispatching employees who were not entitled to be dispatched, or who were dispatched out of sequence as to other persons entitled to priority dispatch shall be subject to prompt resolution through the grievance procedure of the Agreement when a complaint is filed by either party with the Joint Port Labor Relations Committee. If such complaint is not resolved within seven (7) days from the date of filing, the matter shall be referred to the Area Arbitrator whose decision shall be final and binding. The grievance procedure shall then be deemed 'exhausted.'"

## Item 3-Stop-Work Meetings

The parties agree that this item is resolved by revision of Section 12.3 of the Pacific Coast Longshore and Clerks' Agreement as follows:

"12.3 Stop-Work Meetings.

"12.31 Each longshore (and clerks') local shall have the right to hold one regularly scheduled stopwork meeting each month during overtime hours. Such regular meetings by longshore and clerks' locals in a port or within an area shall be scheduled so as to provide maximum work opportunities in the port or area.

"12.32 Any other stop-work meetings must be mutually agreed to by PMA and the Union and PMA shall receive at least one week's notice of such non-scheduled meetings. They shall not occur more often than once a month."

Item 7-Clerks' Jurisdiction

The parties agree that this item is "held over."

Item 9(c)—Gear Priority

The Employers agree to drop their proposal of 4/8/71.

Item 11-Amend Crane Supplement

The Union agrees to drop their proposal of 11/16/70 and the Employers agree to drop their proposal of 4/8/71.

Item 6-Manning

The parties agree that this item is resolved in its entirety by revision of Sections 10.3 and 10.5 of the Pacific Coast Longshore Contract Document and an understanding on LASH manning as follows:

Section 10.8

"10.3(a) Manning for operations existing on June 20, 1972, including existing T-Letters where the method of operation has not changed, shall continue with the Employers having the right to ask for review of such manning through the contract machinery at the Coast LRC level. When such requests are made the review shall be based on a determination of necessary men as defined in 15.2 and the Employers shall not be bound or limited by the basic gang structure provided in 10.2.

"(b) Manning for operations existing on June 20, 1972, including existing T-Letters where a subsequent change in operation after the establishment of the original manning introduces a machine, or device, or new method of operation which results in the need for reduced or increased manning, shall be subject to review through the contract machinery at the Coast LRC level at the request of either party. Where such requests are made the review shall be based on a determination of necessary men as defined in 15.2 and the parties are not bound or limited by the basic gang structure provided in 10.2.

"(c) Any review under (a) or (b) above shall not include a review of the minimum manning provided in

Section 10.21."

Section 10.5.

"10.5 When new methods of operation are introduced after June 20, 1972, the Employers at the Coast level shall submit to the Union a letter describing the operation and the proposed ship manning prior to the anticipated start of the operation. A copy of the letter shall be transmitted to the local Union in the port or ports where the new method of operation will take place. After such notification the following procedure shall be implemented.

"(a) The Joint Port Labor Relations Committee in the port where the new operation is to first take place shall meet promptly and reach agreement or disagreement on the Employers' proposed manning at least 48 hours prior to the anticipated initial starting time of the new operation. If agreement is reached on the Employers' proposed manning, such manning shall be ordered for the

initial working shift of the ship.

"(b) If the Joint Port Labor Relations Committee under step (a) above does not reach agreement on the ship manning proposed by the Employers, the matter shall be immediately referred to the Area Arbitrator for resolution. The Area Arbitrator shall issue a prompt interim decision on the manning to be ordered for the initial working shift of the ship.

LASH Manning

"(c) On the initial working shift of the ship, either party at the local level may request a Joint Port Labor Relations Committee meeting to observe the manning established by either step (a) or (b) above. If either party is dissatisfied with the manning, the Area Arbitrator shall be promptly called to the job. The Area Arbitrator shall observe the operation with the local parties, hear their contentions, and then issue a prompt formal decision on the manning that shall be binding on all subsequent shifts and on future operations in the port, unless changed under step (d) below.

"(d) Either party may appeal a decision by the Area Arbitrator under step (c) above to the Joint Coast Labor Relations Committee. Upon receipt of an appeal, the Joint Coast Labor Relations Committee shall meet within five (5) days, or later, if the parties agree on a subsequent meeting date. If agreement is not reached by the Joint Coast Labor Relations Committee, the matter shall be placed before the Coast Arbitrator whose decision on the

manning shall be final and binding.

"10.51 If a new method of operation is to occur in different areas, the steps defined in 10.5(a) through (d) shall be applicable to the local parties in each area. 'Areas' is defined to mean Washington, Columbia River and Oregon Coast Ports, Northern California and Southern California.

"10.52 If a new method of operation is to occur at more than one port within an area, the Joint Area Labor Relations Committee shall function under the steps defined in 10.5(a) through (d) as a substitute for the Joint Port Labor Relations Committees in the area for the purpose of establishing uniform manning for the area.

"10.53 Any change in operation that introduces a machine, or device, or new method of operation that has as its purpose and effect the reduction of manning by eliminating unnecessary men below the manning specified in 10.2 and subordinate paragraphs, or previously approved letters, shall be presented by the Employers in a new letter, and shall be governed by the procedures provided in 10.5 and subordinate paragraphs."

The parties agree that the manning for the LASH ships and LASH barges shall remain as defined in T-150 with the following exceptions as to manning on LASH barges:

a) On all LASH barge operations, except general break bulk cargo operations when the cargo is to be handhandled piece by piece, the manning shall be skilled men and/or basic longshoremen as determined by the Em-

ployer.

b) On all LASH barge operations, which are general break bulk cargo operations with the cargo to be hand-handled piece by piece, the manning except for holdmen shall be as determined by the Employer. The manning for holdmen shall be four (4) holdmen, subject to the Union's right to claim that additional holdman manning is required because of onerousness. In such event the agreed-to procedure on "Onerousness" is to be followed to resolve such a dispute.

c) When cranes are utilized to load cargo to or discharge cargo from LASH barges, the manning on the operation of the cranes shall conform with applicable

Agreement provisions.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington:

/s/ Harry Bridges

Dated: June 20, 1972

PACIFIC MARITIME ASSOCIATION on behalf of its members:

February 24, 1978

### NO. 8 SUPPLEMENTAL MEMORANDUM OF UNDERSTANDING

The "Memorandum of Understanding" between the parties dated February 10, 1972, spells out in Item (D) of the "General Provisions Applicable to the Pacific Coast Longshore and Clerks Agreement" a listing of eleven (11) items to be resolved by further negotiation, mediation or arbitration.

This "Supplemental Memorandum of Understanding" covers understandings reached by the Parties with respect to the final remaining item as indicated below.

Item 7—Clerks' Jurisdiction

The parties agree that this item is resolved by the following:

(a) The Pacific Coast Clerks' Contract Document is amended by the addition of a new subsection 1.25124 reading as follows:

"1.25124 Also, weighing cargo and/or cargo containers on drive-on type scales and recording weights."

The following understandings apply to the new subsection 1.25124 quoted above:

(1) Where required by the Employer, the Union agrees that Clerks with necessary "Weighmaster Certificates" will be provided.

(2) Where a member company of the Pacific Maritime Association has an existing bargaining relationship, has granted recognition to, and has assigned the work described in subsection 1.25124 above to a bona fide labor bargaining unit as a result of such relationships and recognition, the assignment of such work herein to the ILWU Clerks, shall not become effective unless the ILWU Clerks obtain the right to represent such worker(s) or unless the ILWU Clerks can assume such work as-

signment with the concurrence of such other bargaining unit and without jurisdictional work stoppages.

(b) As provided in Section 15, the Employers have the right to introduce mechanical, electronic or other labor

saving devices on any dock.

When work described in Section 1 of the PCCCD is performed by mechanical, electronic or other devices, the following understandings are applicable:

(1) The necessary operation of such devices shall be performed by Clerks for only that portion of the work which is recognized as being covered by Section 1 of the PCCCD.

(2) The intent of this provision is to preserve the traditional work of Clerks as provided by the Agreement.

(c) The provisions of (a) above shall become operative effective April 1, 1973.

> INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington:

/s/ Wm. T. Ward

Dated: February 24, 1973

PACIFIC MARITIME ASSOCIATION on behalf of its members:

# EXHIBIT C-Memo. of Understanding-June 24, 1973

# MEMORANDUM OF UNDERSTANDING

between

## PACIFIC MARITIME ASSOCIATION

and

# INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

## Dated June 24, 1973

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#### MEMORANDUM OF UNDERSTANDING

#### Between

## PACIFIC MARITIME ASSOCIATION (For the Employers)

and

#### INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

(For and on behalf of itself and each of its longshore locals and clerks locals in California, Oregon and Washington)

# THE PARTIES HERETO AGREE AS FOLLOWS:

- I. MEMORANDUM OF UNDERSTANDING. This Memorandum of Understanding dated June 24, 1973 includes those items agreed to by the parties in the Memorandum of Understanding dated June 9, 1973 and also covers those items agreed to by the parties subsequent to June 9, 1973.
- II. AGREEMENT. The 1966-1971 Pacific Coast Longshore and Clerks' Agreement and the CFS Supplement, as amended, are hereby re-executed and further amended as provided in this "Memorandum of Understanding".

## III. WAGES.

#### Longshore

The basic straight time hourly rate for men paid on a six (6) hour day basis shall be increased by forty cents (40¢) per hour effective 8:00 A.M. on June 30, 1973.\* This brings the basic straight time rate to \$5.50 per hour and the overtime rate to \$8.25 per hour.

The basic straight time hourly rate for men paid on a six (6) hour day basis shall be increased by thirty cents (30¢) per hour effective 8:00 A.M. on June 29, 1974. This brings the basic straight time rate to \$5.80 per hour and the overtime rate to \$8.70 per hour.

For special categories of longshoremen historically paid on an eight (8) hour straight time basis, the straight time hourly rate shall be increased as follows:

Effective 8:00 A.M., June 30, 1973\*—\$.45 Effective 8:00 A.M., June 29, 1974 —\$.34

#### Clerks

Effective 8:00 A.M. on June 30, 1973 the straight time hourly rate for clerks will be \$6.19 and the overtime rate will be \$9.285; the straight time hourly rate for (clerk) supervisors will be \$6.805 and the overtime rate will be \$10.21; the straight time rate for (clerk) chief supervisors and supercargoes will be \$7.545 and the overtime rate will be \$11.32.

Effective 8:00 A.M. on June 29, 1974 the straight time hourly rate for clerks will be \$6.525 and the overtime rate will be \$9.79; the straight time hourly rate for (clerk) supervisors will be \$7.18 and the overtime rate will be \$10.77; the straight time rate for (clerk) chief supervisors and supercargoes will be \$7.95 and the overtime rate will be \$11.925.

# Cost of Living Allowance

- A cost of Living Allowance (COLA) shall become effective at the commencement of the first payroll week beginning after January 1, 1975. A further COLA shall become effective at the commencement of the first payroll week beginning after July 1, 1975.
- The COLA shall be determined on the basis of changes in the Consumer Price Index, U.S. Average, All Items (1967=100) as published by the Bureau of Labor Statistics, U.S. Department of Labor. (CPI).
- The COLA which becomes effective at the commencement of the first payroll week beginning after

January 1, 1975, shall be \$.01 (one cent) per hour for longshoremen (and \$.01125 per hour for clerks) for each full .3 (three tenths) of point increase in the CPI for November 1974 over the CPI for May 1974. The maximum COLA payable for this period shall be \$.12 per straight time hour for longshoremen and \$.135 per straight time hour for clerks.

- 4. The COLA which becomes effective at the commencement of the first payroll week beginning after July 1, 1975 shall be \$.01 (one cent) per hour for longshoremen (and \$.01125 per hour for clerks) for each full .3 (three tenths) of point increase in the CPI for May 1975 over the CPI for November, 1974. The maximum COLA payable for this period shall be \$.10 per straight time hour for longshoremen and \$.1125 per straight time hour for clerks. This COLA shall be in addition to the COLA provided in paragraph 3 above.
- The COLA payable in accordance with paragraphs 3 and 4 are as follows:

Difference in the		Cost of Living Allowance Effective with Designated Payroll Week			
Designated CPI	L/S	Clerk			
3- 5	\$.01 per hour	\$.01125 per hour			
.68	.02	.0225			
.9-1.1	.03	.03375			
1.2-1.4	.04	.045			
1.5-1.7	.06	.05625			
1.8-2.0	.06	.0675			
2.1-2.3	.07	.07875 per hour			
2.4-2.6	.08	.09			
2.7-2.9	.09	.10125			
3.0-3.2	.10	.1125			
3.3-3.5	.11	.12375			
3.6-3.8	.12	.135			

<sup>\*</sup> For longshoremen: Twenty-five cents (25¢) of the forty cents (40¢) will be payable effective June 2, 1973, if approved by the Cost of Living Council. For longshoremen on an 8 hour basis and for clerks appropriate amounts based on the 25¢ will be payable effective June 2, 1973 if approved by the Cost of Living Council.

6. The COLA payable in accordance with paragraphs 3 and 4 above shall be payable weekly. The COLA shall be deemed part of the basic longshore and clerk pay rates, shall not be used when computing wage rates based on the basic longshore and clerk wage rates, but shall be considered an "add on" to longshore and clerk pay. The COLA shall be used to compute overtime, vacation, holiday, and Pay Guarantee Plan pay. COLA's will not be paid for travel time hours. The COLA will not be increased by the clerk supervisor's, the clerk chief supervisor's, the supercargo's, or other workers classification differentials.

#### IV. PAY GUARANTEE PLAN

This Pay Guarantee Plan continues, with modifications herein, the Pay Guarantee Plan provided in the Agreement of February 10, 1972. The provisions of this revised Pay Guarantee Plan as set forth below shall become effective 8:00 A.M. June 30, 1973.

#### Preamble

The basic intention of the Pay Guarantee Plan is to provide a weekly income to eligible registered longshoremen and clerks.

- 1. For each year of the contract the Employers will make available for the Pay Guarantee Plan a Fund of \$6,000,000. One Fifty Second (1/52) of the amount will be available at the end of each payroll week (\$115,385 per week). Pay Guarantee Plan benefits shall be a maximum of 36 hours for A men and a maximum of 18 hours for B men, at the basic straight time rate, except that the Pay Guarantee Plan benefits for B men will be increased to a maximum of 24 hours if, as provided in paragraph 6, circumstances allow.
- A Pay Guarantee Plan eligibility list shall be prepared. Any man who worked one or more hours during the fifty-two week period ending 8 A.M.

May 26, 1973, will be included on the original Pay Guarantee Plan eligibility list. A man who is not on the original Pay Guarantee eligibility list will be added to the list on the July 1st or January 1st that he becomes entitled to Welfare Fund coverage.

Steady men will be removed from Pay Guarantee Plan eligibility when they are employed steady, and the individual employer of steady men shall notify the PMA Area Offices to remove its steady men from Pay Guarantee Plan eligibility commencing the date of employment. Men who have attained age 62 and have 25 years of service and are eligible for Pension benefits shall be excluded from the Pay Guarantee Plan eligibility list.

- 3. A man who is on the eligibility list will be eligible for Pay Guarantee Plan benefits for any week in which he was available for work on the five days, Monday through Friday inclusive, and failure to meet this availability requirement shall disqualify the employee from participation in Pay Guarantee Plan benefits for the week in which the failure occurs. The Union agrees that it has an obligation under the Agreement to provide the Employers with the required work force on Saturdays and Sundays. (Part time union officers and part time joint employees shall have their union and joint employment hours and earnings integrated with their regular employment earnings and "availability" to determine eligibility for Pay Guarantee benefits.)
- 4. At the close of each payroll week the Joint Chief Dispatcher shall furnish PMA the joint records of all men available but not dispatched, and those who flopped, for each day of the payroll week. PMA shall use a combination of days on the job plus "availability" in the joint hall to determine eligibility and calculate Pay Guarantee Plan payments.

When calculating a man's regular weekly Pay Guarantee Plan (PGP) payment, the PGP benefit is 36 hours pay at the longshore straight time rate for A men and 18 hours pay at the longshore straight time rate for B men. If a man's earnings for a week are less than his PGP benefit, he will be paid the difference between his earnings (as defined in the rules) and the benefit. After the third week of the PGP, if his earnings for the current four week period are less than PGP benefits for the four week period, he will be paid the difference between his earnings for the four weeks and PGP benefits for four weeks. If in any of the four weeks his earnings were less than the benefit amount and he did not get a PGP payment because he was ineligible that week, his PGP payment for the four week period will be calculated as if his earnings for that week were equal to the PGP benefit.

Pay Guarantee payments will be adjusted in accordance with paragraph 5(b) when that paragraph applies. PMA then shall furnish to the local union a list of men showing their hours worked, their earnings, their "availability" and the amount of Pay Guarantee Plan payments for which a man is eligible before the adjustment if any, the amount of the adjustment, and the net payment after adjustment.

- (a) If the total payments do not exceed the weekly \$115,385, PMA will prepare checks for payment and such checks will be available for distribution in accordance with the rules.
  - (b) If the total Pay Guarantee Plan payments exceed \$115,385, an across-the-board percentage reduction will be made to reduce the total figure to \$115,385.
- 6. If during the first 13 payroll weeks there are weeks in which the amount paid out for Pay Guarantee Plan purposes is less than the \$115,385, any excess monies for those payroll weeks will be retained in the Fund until the end of the first 13 week period of the contract, at which time a review of total payments will be made. Any such excess

monies will be used to make a lump sum payment to any registered man who, during the first 13 week period, had his weekly Pay Guarantee Plan benefit reduced under the provisions of 5(b) above. Such lump sum payments in the aggregate shall not be in an amount to make the total cost of the Pay Guarantee Plan for the first 13 week period exceed the total amount of 13 times \$115,385.

A lump sum or "make whole" payment to a man from such excess monies shall be the difference between his Guarantee payments for the 13 week period and the amount he would have been entitled to if there had been no reduction under paragraph 5(b). If the total of such "make whole" payments would exceed the excess money, such "make whole" payments will be reduced by an across-the-board percentage reduction so that no more than the total excess monies are paid out.

If there is money left over after the "make whole" payments have been made, B men will be paid up to an additional 6 hours at the basic straight time rate for each week in which they were entitled to a Pay Guarantee Plan payment. If the total of such payments would exceed the money left over, such additional payments will be reduced by an across-the-board percentage reduction so that no more is paid out during the 13 week period than 13 times \$115,385.

7. The procedures described in the preceding paragraphs shall apply in like manner to the succeeding 13 week periods of the agreement. Any amount left unused in a preceding 13 week period shall be carried over to the end of the following period and used for "make whole" payments for that period. At the end of the fourth 13 week period, if there is an excess left after "make whole" payments have been made for that period, such excess will be used to "make whole" any men who were not "made whole" in prior periods.

- 8. No registered man shall be eligible for Pay Guarantee Plan payments for more than 52 payroll weeks per payroll year minus the number of weeks of vacation for which he is paid in that year.
- 9. A man may count all Pay Guarantee Plan hours for which he is eligible for payment toward his Welfare Plan and Pension Plan eligibility. A man's Pay Guarantee Plan hours will be calculated at the end of each 13 week period by dividing the Pay Guarantee Plan payments for which he is eligible for the period by the basic straight time rate.
- 10. A work stoppage by any Local(s) in violation of Section 11.1 of the PCL&CD shall disqualify all registered men in the port(s) affected from payment under this Plan in the payroll week that the violation occurs. In each week a coastwise work stoppage occurs, the Employers' obligation for \$6,000,000 will be reduced by the \$115,385 which was to be available for that payroll week.
- 11. In the event that unions other than those signatory to the PCL&CD have work stoppages or there occurs an Act of God (described herein as "force majeure") that creates a need to provide Pay Guarantee payments in a port, area, or on a coastwise basis, for a period extending beyond one payroll week, Pay Guarantee Plan payments will be suspended in the port, area, or coastwise, as applicable, until work can be resumed. There shall be no reduction in the Employers' liability for the Pay Guarantee Plan Fund as a result of such incidents.
- 12. The Employers will determine the method by which the \$6,000,000 per year will be collected and made available at the rate of \$115,385 per payroll week.
- Disputes arising over the interpretation or application of the terms of the Pay Guarantee Plan shall be processed through the contract grievance machinery.

#### V. HOLIDAYS

Delete "Section 5—Holidays" of the Pacific Coast Longshore & Clerks Agreement in its entirety and substitute the following:

#### "SECTION 5-HOLIDAYS

"5.1 The following holidays shall be recognized: New Year's Day, Lincoln's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Statewide Election Day, Christmas Day, or any other legal holiday that may be proclaimed by state or national authority.

"5.2 Holiday observance and work schedule. The observance of holidays and the work schedule on the holidays listed in section 5.1 shall be as follows in all U.S. Pacific Coast ports:

#### New Year's Day

January 1

-Work shall be on a voluntary basis from 3:00 P.M. December 31st until 7:00 A.M. January 2nd.

Exception: An extended shift will be worked from 3:00 P.M. to 5:00 P.M. on December 31st for the purpose of finishing a ship.

#### Lincoln's Birthday

February 12

-Normal work day.

#### Washington's Birthday

3rd Monday in February

-Normal work day.

#### Memorial Day

Last Monday in May

-Normal work day.

## Independence Day

July 4

-Normal work day.

## Labor Day

1st Monday in September -

-Normal work day.

#### Columbus Day

2nd Monday in October

-Normal work day.

Veterans' Day

4th Monday in October

-Normal work day.

Statewide Election Day

as proclaimed

-Normal work day.

Thanksgiving Day

4th Thursday in November -Normal work day.

Christmas Day

December 25

-Work shall be on a voluntary basis from 3:00 P.M. December 24th until 7:00 A.M. December 26th.

Exception: An extended shift will be worked from 3:00 P.M. to 5.00 P.M. on December 24th for the purpose of finishing a ship.

Any Other Legal Holiday

As proclaimed by state or national authority

-Normal work day.

"5.21 When a holiday falls on Sunday, the work schedule provided in Section 5.2 shall apply on Sunday; however, the holiday shall be observed on Monday and payment as provided in Sections 5.32, 5.321 and 5.322 shall apply to Monday.

"5.22 On Election Day the work shall be arranged

so as to enable the men to vote.

"5.23 Where work ceases at 3:00 P.M. (December 24th and December 31st) the day shift guarantee shall be 6 hours on an 8:00 A.M. start and 5 hours on a 9:00 A.M. start.

"5.24 Any work schedule restriction provided in Section 5.2 shall not apply in the event of an emergency

involving the safety of vessel, life or property.

"5.3 Paid holidays. The following holidays shall be recognized as 'paid holidays', effective July 1, 1973: Christmas Day and New Year's Day. The following holidays shall be recognized as 'paid holidays', effective July 1, 1974: Independence Day, Labor Day and Thanksgiving Day.

"5.31 Eligibility for paid holidays. Only registered employees are entitled to receive a 'paid holiday', provided:

"5.311 They have registration status on the date of the 'paid holiday', and

"5.312 Have worked 800 hours in the prior payroll year or the most recent payroll year during which there was sufficient work opportunity in their port of registra-

tion to have done so.

"5.313 In addition to 5.311 and 5.312, employees receiving their job assignments through the dispatch hall must meet the availability requirement of the Pay Guarantee Plan for at least two of the five days, Monday through Friday, (exclusive of the holiday) during the payroll week in which the holiday falls.

"5.314 In addition to 5.311 and 5.312, employees working on a steady basis must meet the availability

requirement of their employer.

"5.315 The availability provision of 5.313 or 5.314 shall not apply to absence while on vacation or because of sickness or injury which is verified.

"5.32 Payment. Registered employees eligible for a 'paid holiday' shall receive eight (8) hours at the basic

longshore (or clerk) straight time rate of pay.

"5.321 Registered employees eligible for a 'paid holiday' shall receive payment as provided in 5.32 above, whether they work or not. When registered employees who are eligible for a 'paid holiday' perform work on such holiday, their additional payment for working shall be as prescribed in Section 6.

"5.322 Registered employees not eligible for a 'paid holiday' and non-registered employees who perform work on any of the paid holidays listed in 5.3 above shall be

paid for working as prescribed in Section 6.

"5.83 Disbursement. Payment for each 'paid holiday' shall be made on that pay day which is the regular pay day for disbursing payroll checks for the payroll week in which the 'paid holiday' falls. The Pacific Maritime Association shall be the disbursing agent for such payments.

"5.34 Work force availability. The Union agrees that employees shall be available to meet the Employers' work requirements on all holidays in accordance with the work schedule contained in 5.2."

#### VI. PENSIONS

a) For men 59-65 with 13-24 years of service, add provision for pension payable upon leaving industry and actuarially discounted from age 65, plus welfare coverage and widow's benefit of  $\frac{1}{2}$  the actuarially discounted pension. (Effective  $\frac{7}{1}$ ?

b) For men 55-61 with 25 years of service, provide the present deferred pension payable at normal retirement age of 62 rather than 65, and for men 55-58, pension payable on leaving the industry be actuarially discounted from age 62 rather than 65. (Effective 7/1/73.)

c) For men 55-59 with 13-24 years of service, provide pension payable upon leaving industry, actuarially discounted from 65, and a widow's benefit of ½ the actuarially discounted pension. (Effective 7/1/73.)

d) Extend present widow's benefit for non-retired man with 25 years of service to age 59. (Effective 7/1/74.)

#### VII. WELFARE

#### 1. Dental

- A. The present dental plan provides benefits equal to 95% of the schedule of amounts for each procedure. The benefit is to be improved to 100% of that schedule. (Effective 7/1/73.)
- B. The present children's dental program of 100% of the cost of covered services applies to dependent children up to age 15. The coverage will be extended to all dependent children to age 19. (Effective 7/1/73.)
- C. Orthodontia services will be provided on a 50% co-insurance basis up to a maximum of \$500.00; that is, the plan would pay one-half of the first \$1,000 of orthodontia cost per individual. (Effective 7/1/73.)
- 2. Vision care through a plan providing an annual eye examination, annual lenses if prescription changes, and frames every other year. These would be available through a panel of optometrists and the plan requires a

\$5.00 payment by the employee for each examination. (Effective 7/1/74.)

3. In those ports where the employee has an option to choose hospital-medical coverage using either Kaiser type medical plans or an insurance program, the insurance program would be improved so that the out-of-pocket cost to the employee would be reduced to the same proportionate level as in existence at the inception of the plan. (Effective 7/1/73.)

4. Kidney Dialysis—To provide kidney dialysis in the home or non-hospital treatment center during the first two months prior to Medicare picking up the cost and for those individuals not entitled to Medicare coverage.

(Effective 7/1/74.)

5. The following changes in eligibility for welfare will be included:

- A. Eligibility for dependent children varies from program to program and would be standardized at full welfare coverage from birth to age 19 (age 21 in Portland under the Kaiser Program) and thereafter to age 23 for dependent children who are full-time students. (Effective 7/1/73.)
- B. Incapacitated dependent children will continue to have eligibility beyond the age limits while they are incapacitated. (Effective 7/1/73.)
- C. Upon the death of an active man, welfare coverage for his widow and dependent children would continue for one year, with provision to continue coverage thereafter at her own expense. (Effective 7/1/74.)

#### VIII. VACATIONS.

a) Applicable to Longshore only: Substitute 7.25, 7.251 and 7.252 of the Clerks Contract Document for the present Section 7.25 in the Longshore Contract Document. (Effective 7/1/73.)

b) Applicable to Longshore & Clerks: Effective July 1, 1974 provide a maximum of four weeks vacation after seventeen years, and a maximum of five weeks

vacation after twenty-three years (applicable to vacation

qualification in 1974, payable in 1975).

c) Applicable to Longshore & Clerks: Effective July 1, 1974 reduce the two week basic vacation requirement of 1344 hours to 1300 hours (applicable to vacation qualification in 1974, payable in 1975).

d) Applicable to Longshore only: Effective July 1, 1974 reduce the 1600 hours requirement in 7.14 to 1500 hours (applicable to vacation qualification in 1974, pay-

able in 1975).

e) Applicable to Longshore & Clerks: Change Section 7.42 to provide for the distribution of vacation checks in the first week in April (applicable to vacations earned during the calendar year 1973, payable in 1974).

# IX. ILWU-PMA NONMEMBER PARTICIPATION AGREEMENT

The "ILWU-PMA Nonmember Participation Agreement" is revised as follows:

#### ILWU-PMA NONMEMBER PARTICIPATION AGREEMENT

The PMA-ILWU jointly registered work force (hereinafter referred to as the "joint work force") exists as a result of the registration process beginning in 1935 under successive Pacific Coast Longshore and Clerks Agreements (herein called "PCLCA") and the Walking Bosses and Foremen's Agreement. These agreements have been between the Pacific Maritime Association and its predecessors (PMA) and the International Longshoremen's and Warehousemen's Union and its longshore, clerks and walking bosses/foremen's locals in California, Oregon and Washington (ILWU). The men in the joint work force have "jobs" in which they work on an interchangeable basis for the many business entities involved in or related to the movement of cargo to and from ships in California, Oregon and Washington. Some of these business entities are not members of PMA. The following provisions apply to such nonmembers of PMA.

- 1. A business entity not a member of PMA must participate in this ILWU-PMA Nonmember Participation Agreement if it uses men in the joint work force.
- 2. The nonmember participant's separate ILWU contract must conform with the provisions hereof, and the provisions of the PCLCA governing the selection of men for inclusion in the joint work force.
- 3. A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA. For example a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA.

b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, non-member participants shall not obtain men from the dis-

patch hall,

c) if during a work stoppage by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch hall for PMA members, such limited dispatch shall be available to nonmember participants.

The essence of b) and c) of this section is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a

work stoppage against nonmember participants.

- 4. Should any nonmember participant cease to have the right to obtain men through the allocation and dispatching system, such nonmember shall nevertheless continue under a duty to meet all of its obligations based upon its use of the joint work force including accrued obligations for PMA assessments and dues, obligations for retroactive and current assessments for fringe benefits, obligations to meet liabilities under paragraph 10 hereof, and all other obligations with respect to the pay of workers paid through the central pay office during the period of its participation in the use of the joint work force.
- 5. A nonmember participant may obtain and employ a man in the joint work force on a steady basis in the same way a member may do so. When such participant

employs a man to work on a steady basis, it shall notify PMA immediately. On request from PMA, each such participant shall furnish to PMA a list of men it is using on a steady basis. Steady men shall participate in the Pay Guarantee Plan in accordance with the rules that

are adopted by PMA and ILWU.

6. For purposes of 1.53 through 1.57 of the Container Freight Station Supplement (CFSS) of the PCLCA, a nonmember participant who uses the joint work force at terms and conditions of employment no more favorable to the nonmember participant than those provided under the PCLCA, including the CFSS, may be deemed to be a "member of PMA" insofar as it is so using the joint work force.

7. The nonmember participant shall participate in the ILWU-PMA Pension Plan, the ILWU-PMA Welfare Plan, the PMA Vacation Plans (longshoremen and clerks, and walking bosses/foremen) and the ILWU-PMA Guarantee Plans (longshoremen and clerks/ and walking bosses/foremen) in accordance with the terms applicable to such participation. Such nonmember shall make payments into these Plans at the same rates and at the same times as members of PMA are to make the respective payments. Attached are statements of terms and conditions currently in effect with respect to such participation. Nonmember Participants shall be subject to the same audits as members of PMA.

8. The nonmember participant shall use the PMA central pay system and central records office and must sign the standard forms of participation documents for the central records office and central pay system. Amounts due with respect to the central pay and central records system shall be paid to PMA at the time and in the man-

ner prescribed for members of PMA.

Note: The hours for which pay is distributed through the central pay office to any man within the joint work force, with respect to his being used by such nonmember pursuant to the terms hereof, shall be deemed hours of work for a PMA member company for purposes of determining the individual longshoremen's eligibility for vacations, welfare, pensions, pay guarantee, promotion, transfer, advancement in registered status, seniority, and all other aspects of his work history as a member of the joint work force.

9. Each nonmember participant shall pay to the PMA an amount equal to the dues and assessments on the same basis that a PMA member would pay. Payments shall be made at the same time the member would pay.

10. If a nonmember participant becomes delinquent under paragraphs 7, 8, or 9 hereof no joint work force workers shall be furnished to the delinquent nonmember.

11. It is believed that all provisions of this agreement are now lawful, and it is assumed that they will continue to be lawful. Should there at any time be a determination that any portion of this agreement is contrary to law, the remaining provisions shall continue to be binding upon the parties unless ILWU or PMA gives notice of the termination of this entire agreement.

12. The ILWU-PMA Nonmember Participation Agreement shall be binding and continue in effect until terminated on such terms and conditions as may be mutually agreed to by the PMA, the ILWU and the participant. An entity that terminates its participation shall at such time no longer be eligible to employ men in the joint work force nor to participate in the Pension, Welfare,

Vacation and Pay Guarantee Plans existing between ILWU and PMA.

	Agreed to by:
	(Participant)
	Ву
	Approved by INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington
Dated: -	
	by [ARITIME ASSOCIATION of its members

#### X. REGISTRATION

## A. No Lay-Offs

There shall be no reduction in registered longshoremen or clerks work force during the term of the Agreement except for normal attrition due to quits, deaths and retirements, and deregistration for cause. This does not preclude the parties from agreeing upon a reduction in force should unusual circumstances develop.

## B. Promotion of B Men

- (1) The "freeze" on promotions from Class B to Class A registration is lifted.
- (2) Coast Referrals now pending on promotions from B to A are hereby approved effective July 1, 1973.
- (3) Subject to the ultimate control of the parties at the Coast level, local Joint Port Labor Relations Committees may submit requests for promotions from B to A on an orderly basis.
- (4) In those ports on July 1, 1973, established to be low work opportunity ports (average hours less than 18 for A men and less than 9 for B men), the parties agree to expedite work force adjustment procedures which may include all or any of the procedures labelled a) b) and c) following:

In those ports with an excess of A and/or B men, but with the excess not in sufficient numbers with the present workload to place the port for either or both categories in the low work opportunity port category (average hours less than 18 hours for A men—less than 9 for B men) the parties agree to

 a) offer men on some seniority basis an opportunity to transfer to ports where extra men are needed, and subject to approval of the local which may need men; b) provide that on an attrition basis, B men

will be promoted to A; and

c) request the local parties to submit a plan to the Coast level for the promotion of remaining B men on an orderly basis over a period which could extend beyond the two year contract period.

(5) Local 19 "B" registered Phase 1 linehandlers shall be advanced to A status. Those linehandlers so advanced who are unable to pass longshore physical examinations shall be frozen on their linehandler job while such exists or until they leave the industry.

#### XI. GRIEVANCE MACHINERY

a) Amend Section 17.283 of the Pacific Coast Longshore & Clerks Agreement by adding a final sentence as follows:

"Either party may request that

"a) grievances arising under 17.7 or involving dispatch hall disputes (except those covered by item 9(b) of the Supplemental Memorandum of Understanding dated June 20, 1972) be processed initially and from step to step within twenty-four (24) hours; and

"b) failures to observe area arbitrators' awards be processed to the next step within twenty-four

(24) hours."

b) Amend Section 17.54 of the Pacific Coast Longshore & Clerks Agreement as follows:

"17.54 In the event the parties agree that an arbitrator has exceeded his authority and jurisdiction or that he is involved in the industry in any other position of interest which is in conflict with his authority and jurisdiction, he shall be disqualified for any further service."

#### XII. CLERKS CONTRACT COVERAGE

1. Amend section 1.11 of the Clerks Contract Document to read as follows:

"1.11 This Contract Document covers clerks' work with respect to the movement of outbound cargo only from the time it enters a dock and comes under the control of any terminal, stevedore, agent or vessel operator covered by this Contract Document and covers movement of inbound cargo only so long as it is at a dock and under the control of any vessel operator, agent, stevedore, or terminal covered by this Contract Document.

2. Delete section 1.2541 from the Clerks Contract

Document.

#### XIII. SKILL RATES

Amend the Longshore Contract Document to include a new section 6.351 as follows:

"6.351 When new power equipment is introduced, the Employer at the Coast level shall submit to the Union a letter describing the equipment and the proposed skill rate prior to the anticipated use of such equipment. A copy of the letter shall be transmitted to the local(s) in the port(s) where the new equipment is to be introduced. After such notification, the following procedure shall be implemented.

a) The Joint Port Labor Relations Committee in the port where the new power equipment is introduced shall meet promptly and reach agreement or disagreement on the Employers' proposed skill rate at least 48 hours prior to the anticipated use of the new equipment. If agreement is reached on the Employees' proposal, such skill

rate shall be a rate in Section 6.33.

b) If the Joint Port Labor Relations Committee under step a) above does not reach agreement on the skill rate proposed by the Employers, the matter shall be immediately referred to the Area Arbitrator for resolution. The Area Arbitrator shall issue a prompt interim decision on the skill rate to be paid for the initial use of the equipment. c) On the initial working shift of the equipment, either party at the local level may request a Joint Port Labor Relations Committee meeting to observe the equipment in use as established by either step a) or b) above. If either party is dissatisfied with the skilled rate, the Area Arbitrator shall be promptly called to the job. The Area Arbitrator shall observe the operation with the local parties, hear their contentions, and then issue a prompt formal decision on the skilled rate that shall be final and binding, unless changed under step d) below.

d) Either party may appeal a decision by the Area Arbitrator under step c) above to the Joint Coast Labor Relations Committee. Upon receipt of an appeal, the Joint Coast Labor Relations Committee shall meet, within five (5) days, or later, if the parties agree on a subsequent meeting date. If agreement is not reached by the Joint Coast Labor Relations Committee, the matter shall be placed before the Coast Arbitrator whose decision on the skilled rate shall be final and binding."

#### XIV. SCHEDULED DAYS OFF

a) Amend section 4.1 of the Longshore Contract Document to read as follows:

"4.1 Each registered longshoreman shall be entitled to two full days (48 hours) off each payroll week."

b) Delete section 4 of the Clerks Contract Document in its entirety and substitute the following:

"4.1 Each registered clerk, other than monthly and preferred, shall be entitled to two full days (48 hours) off each payroll week.

"4.11 The Joint Port Labor Relations Committee shall fix, arrange, direct, and schedule days off in advance in accordance with the above to the extent possible considering needs of the port and men available.

"4.2 Each monthly and preferred clerk shall be entitled to two full days (48 hours) off each payroll week, as agreed between himself and his employer."

# XV. HEALTH AND SAFETY & PENALTY CARGO

a) The Parties agree to refer to a joint subcommittee the task of updating the existing Pacific Coast Marine Safety Code and the Penalty Cargo List, with a sixmonth time limit after the new Agreement becomes effective to accomplish their assignment. The penalty cargo rates shall not be subject to change.

b) Amend section 11.41 of the Pacific Coast Longshore

and Clerks' Agreement to read as follows:

"11.41 Longshoremen (Clerks) shall not be required to work work when in good faith they believe that to do so is to immediately endanger health and safety. Only in cases of bona fide health and safety issues may a standby be justified. The union pledges in good faith that health

and safety will not be used as a gimmick.

The employer shall have the option of having the men who raise a question of health and safety stand by until a decision is reached or "working around" the situation until it can be resolved, and no further work shall be performed on that disputed operation until the health and safety issue is resolved. Supplement III sets forth the agreed procedures with respect to disputes on health and safety."

#### XVI. MEDIATION/ARBITRATION

Pursuant to the Mediation/Arbitration Process clause of the June 9, 1973 Memorandum of Understanding between the parties, the following subjects are being submitted to Sam Kagel for arbitration:

- 1) Traveling men and gangs;
- Moving expenses of men transferred from distressed ports;
- 3) Penalty pay for the tenth hour on an extended shift; and
- 4) Damaged cargo rate.

In addition, the "Jurisdiction-LASH" issue is still in negotiations and may also be arbitrated.

The parties agree that the Arbitrator is not bound to issue his Decisions by the June 30, 1973 date as specified in the June 9, 1973 Memorandum of Understanding.

#### XVII. RATIFICATION

This Memorandum of Understanding is subject to ratification by both parties.

#### XVIII. GOVERNMENTAL AGENCIES APPROVALS

Pension, Welfare and Pay Guarantee Plans are all subject to and conditional upon receipt of satisfactory tax rulings from appropriate Federal and state agencies. If unsatisfactory rulings are received, the parties will meet to make required changes in the Plan(s) to comply with the rulings.

#### XV. TERM OF AGREEMENT

Amend Section 20.1 of the PCL&CA by changing the termination date to 8:00 A.M. July 1, 1975.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington:

/s/ Harry Bridges

Dated: June 24, 1973

PACIFIC MARITIME ASSOCIATION on behalf of its members:

/s/ Ed J. Flynn

EXHIBIT B-Memo. of Understanding-June 9, 1973

#### MEMORANDUM OF UNDERSTANDING

#### Between

PACIFIC MARITIME ASSOCIATION (For the Employees)

and

#### INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

(For and on behalf of itself and each of its longshore locals and clerks locals in California,
Oregon and Washington)

The 1966-1971 Pacific Coast Longshore and Clerks' Agreement, as amended, shall be re-executed and further amended as follows:

APPLICABLE
TO
LONGSHORE AND CLERKS

#### I. WAGES

Longshore

The basic straight time hourly rate for men paid on a six (6) hour day basis shall be increased by forty cents (40¢) per hour effective 8:00 a.m. on June 30, 1973.\* This brings the basic straight time rate to \$5.50 per hour and the overtime rate to \$8.25 per hour.

The basic straight time hourly rate for men paid on a six (6) hour day basis shall be increased by thirty cents (30¢) per hour effective 8:00 a.m. on June 29, 1974. This brings the basic straight time rate to \$5.80 per hour and the overtime rate to \$8.70 per hour.

For special categories of longshoremen historically paid on an eight (8) hour straight time basis, the straight time hourly rate shall be increased as follows: Effective 8:00 a.m., June 30, 1973 \*—\$ .45 Effective 8:00 a.m., June 29, 1974 —\$ .34

#### Clerks

Effective 8:00 a.m. on June 30, 1973 \* the straight time hourly rate for clerks will be \$6.19 and the overtime rate will be \$9.285 the straight time hourly rate for (clerk) supervisors will be \$6.805 and the overtime rate will be \$10.21 the straight time rate for (clerk) chief supervisors and supercargoes will be \$7.545 and the overtime rate will be \$11.32.

Effective 8:00 a.m. on June 29, 1974 the straight time hourly rate for clerks will be \$6.525 and the overtime rate will be \$9.79 the straight time hourly rate for (clerk) supervisors will be \$7.18 and the overtime rate will be \$10.77 the straight time rate for (clerk) chief supervisors and supercargoes will be \$7.95 and the overtime rate will be \$11.925.

#### Cost of Living Increases

Effective January 1, 1975, 1¢ for each full .3 increase in Consumer Price Index with a 12¢ maximum based on CPI movement from May 1, 1974 to October 31, 1974.

Effective July 1, 1975, 1¢ for each full .3 increase in Consumer Price Index with a 10¢ maximum based on CPI movement from November 1, 1974 to April 30, 1975.

Increases not part of base rate, but used to compute Overtime, Vacations, Holidays, and Pay Guarantee Plan payments.

[Full Cost of Living clause to be drafted.]

## II. PAY GUARANTEE PLAN

#### Preamble

The basic intention of the Pay Guarantee Plan is to provide a weekly income to eligible registered longshoremen and clerks.

- 1. For each year of the contract the Employers will make available for the Pay Guarantee Plan a Fund of \$6,000,000. One Fifty Second (1/52) of the amount will be available at the end of each payroll week (\$115,385 per week). Pay Guarantee Plan benefits shall be a maximum of 36 hours for A men and a maximum of 18 hours for B men, at the basic straight time rate, except that the Pay Guarantee Plan benefits for B men will be increased to a maximum of 24 hours if, as provided in paragraph 6, circumstances allow.
- 2. A Pay Guarantee Plan eligibility list shall be prepared. Any man who worked one or more hours during the fifty-two week period ending 8 A.M. May 26, 1973, will be included on the original Pay Guarantee Plan eligibility list. A man who is not on the original Pay Guarantee eligibility list will be added to the list on the July 1st or January 1st that he becomes entitled to Welfare Fund coverage.

Steady men will be removed from Pay Guarantee Plan eligibility when they are employed steady, and the individual employer of steady men shall notify the PMA Area Offices to remove its steadymen from Pay Guarantee Plan eligibility commencing the date of employment. Men who have attained age 62 and have 25 years of service and are eligible for Pension benefits shall be excluded from the Pay Guarantee Plan eligibility list. (The Union will submit rules regarding these matters and others noted below.\*)

3. A man who is on the eligibility list will be eligible for Pay Guarantee Plan benefits for any week in

<sup>\*</sup>For longshoremen: Twenty-five cents (25¢) of the forty cents (40¢) will be payable effective June 2, 1973, if approved by the Cost of Living Council. For longshoremen on an 8 hour basis and for clerks appropriate amounts based on the 25¢ will be payable effective June 2, 1973 if approved by the Cost of Living Council.

which he was available for work on the five days, Monday through Friday inclusive, and failure to meet this availability requirement shall disqualify the employee from participation in Pay Guarantee Plan benefits for the week in which the failure occurs. The Union agrees that it has an obligation under the Agreement to provide the Employers with the required work force on Saturdays and Sundays. (Part time union officers and part time joint employees shall have their union and joint employment hours and earnings integrated with their regular employment earnings and "availability" to determine eligibility for Pay Guarantee benefits.)

4. At the close of each payroll week the Joint Chief Dispatcher shall furnish PMA the joint records of all men available but not dispatched, and those who flopped, for each day of the payroll week. PMA shall use a combination of days on the job plus "availability" in the joint hall to determine eligibility and calculate Pay Guarantee Plan payments.

A man's Pay Guarantee Plan payment is the difference between the Pay Guarantee Plan benefit (36 hours for A men and 18 hours for B men) and the man's weekly earnings. (Rules ) Pay Guarantee Plan payments will be adjusted in accordance with paragraph 5(b) when that paragraph applies. PMA then shall furnish to the local union a list of men showing their hours worked, their earnings, their "availability" and the amount of Pay Guarantee Plan payments for which a man is eligible before the adjustment if any, the amount of the adjustment, and the net payment after adjustment.

- 5. (a) If the total payments do not exceed the weekly \$115,385, PMA will prepare checks for payment and such checks will be available for distribution in accordance with the rules.
  - (b) If the total Pay Guarantee Plan payments exceed \$115,385, an across-the-board percentage

reduction will be made to reduce the total figure to \$115,385.

6. If during the first 13 payroll weeks there are weeks in which the amount paid out for Pay Guarantee Plan purposes is less than the \$115,385, any excess monies for those payroll weeks will be retained in the Fund until the end of the first 13 week period of the contract, at which time a review of total payments will be made. Any such excess monies will be used to make a lump sum payment to any registered man who, during the first 13 week period, had his weekly Pay Guarantee Plan benefit reduced under the provisions of 5(b) above. Such lump sum payments in the aggregate shall not be in an amount to make the total cost of the Pay Guarantee Plan for the first 13 week period exceed the total amount of 13 times \$115,385.

A lump sum or "make whole" payment to a man from such excess monies shall be the difference between his Guarantee payments for the 13 week period and the amount he would have been entitled to if there had been no reduction under paragraph 5(b). If the total of such "make whole" payments would exceed the excess money, such "make whole" payments will be reduced by an across-the-board percentage reduction so that no more than the total

excess monies are paid out.

If there is money left over after the "make whole" payments have been made, B men will be paid up to an additional 6 hours at the basic straight time rate for each week in which they were entitled to a Pay Guarantee Plan payment. If the total of such payments would exceed the money left over, such additional payments will be reduced by an across-the-board percentage reduction so that no more is paid out during the 13 week period than 13 times \$115,385.

7. The procedures described in the preceding paragraphs shall apply in like manner to the succeeding 13 week periods of the agreement. Any amount left

unused in a preceding 13 week period shall be carried over to the end of the following period and used for "make whole" payments for that period. At the end of the fourth 13 week period, if there is an excess left after "make whole" payments have been made for that period, such excess will be used to "make whole" any men who were not "made whole" in prior periods.

- 8. No registered man shall be eligible for Pay Guarantee Plan payments for more than 52 payroll weeks per payroll year minus the number of weeks of vacation for which he is paid in that year.
- 9. A man may count all Pay Guarantee Plan hours for which he is eligible for payment toward his Welfare Plan and Pension Plan eligibility. A man's Pay Guarantee Plan hours will be calculated at the end of each 13 week period by dividing the Pay Guarantee Plan payments for which he is eligible for the period by the basic straight time rate.
- 10. A work stoppage by any Local(s) in violation of Section 11.1 of the PCL&CD shall disqualify all registered men in the port(s) affected from payment under this Plan in the payroll week that the violation occurs. In each week a coastwise work stoppage occurs, the Employers' obligation for \$6,000,000 will be reduced by the \$115,385 which was to be available for that payroll week.
- 11. In the event that unions other than those signatory to the PCL&CD have work stoppages or there occurs an Act of God (described herein as "force majeure") that creates a need to provide Pay Guarantee payments in a port, area, or on a coastwise basis, for a period extending beyond one payroll week, Pay Guarantee Plan payments will be suspended in the port, area, or coastwise, as applicable, until work can be resumed. There shall be no reduction in the Employers' liability for the Pay Guarantee Plan Fund as a result of such incidents.

- 12. The Employers will determine the method by which the \$6,000,000 per year will be collected and made available at the rate of \$115,385 per payroll week.
- Disputes arising over the interpretation or application of the terms of the Pay Guarantee Plan shall be processed through the contract grievance machinery.

<sup>\*</sup> NOTE: Omitted from the preceding paragraphs are several items to which the parties agree to direct their immediate attention including but not limited to the following:

<sup>1.</sup> Travel Rules.

<sup>2.</sup> Unemployment Compensation and other earnings.

<sup>3.</sup> Flopping jobs, walking off job, disciplinary action, dispatched but not reporting.

<sup>4.</sup> Distressed ports.

<sup>5.</sup> Eligibility list and benefit plan qualifications.

#### III. PENSIONS

a) For men 59-65 with 13-24 years of service, add provision for pension payable upon leaving industry and actuarially discounted from age 65, plus welfare coverage and widow's benefit of ½ the actuarially discounted

pension. (Effective 7/1/73.)

b) For men 55-61 with 25 years of service, provide the present deferred pension payable at normal retirement age of 62 rather than 65, and for men 55-58, pension payable on leaving the industry be actuarially discounted from age 62 rather than 65. (Effective 7/1/73.)

c) For men 55-59 with 13-24 years of service, provide pension payable upon leaving industry, actuarially discounted from 65, and a widow's benefit of ½ the actuarially discounted pension. (Effective 7/1/73.)

d) Extend present widow's benefit for non-retired man with 25 years of service to age 59. (Effective 7/1/74.)

#### IV. WELFARE

#### 1. Dental

- A. The present dental plan provides benefits equal to 95% of the schedule of amounts for each procedure. The benefit is to be improved to 100% of that schedule. (Effective 7/1/73.)
- B. The present childrens dental program of 100% of the cost of covered services applies to dependent children up to age 15. The coverage will be extended to all dependent children to age 19. (Effective 7/1/73.)
- C. Orthodontia services will be provided on a 50% co-insurance basis up to a maximum of \$500.00; that is, the plan would pay one-half of the first \$1,000 of orthodontia cost per individual. (Effective 7/1/73.)
- 2. Vision care through a plan providing an annual eye examination, annual lenses if prescription changes, and frames every other year. These would be available through a panel of optometrists and the plan requires a \$5.00 payment by the employee for each examination. (Effective 7/1/74.)
- 3. In those ports where the employee has an option to choose hospital-medical coverage using either Kaiser type medical plans or an insurance program, the insurance program would be improved so that the out-of-pocket cost to the employee would be reduced to the same proportionate level as in existence at the inception of the plan. (Effective 7/1/73.)
- 4. Kidney Dialysis—To provide kidney dialysis in the home or non-hospital treatment center during the first two months prior to Medicare picking up the cost and for those individuals not entitled to Medicare coverage. (Effective 7/1/74.)
- 5. The following changes in eligibility for welfare will be included:

- A. Eligibility for dependent children varies from program to program and would be standardized at full welfare coverage from birth to age 19 (age 21 in Portland under the Kaiser Program) and thereafter to age 23 for dependent children who are full-time students. (Effective 7/1/73.)
- B. Incapacitated dependent children will continue to have eligibility beyond the age limits while they are incapacitated. (Effective 7/1/73.)
- C. Upon the death of an active longshoreman, welfare coverage for his widow and dependent children would continue for one year, with provision to continue coverage thereafter at her own expense. (Effective 7/1/74.)

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#### V. VACATIONS

(A) Applicable to Longshore only: Substitute 7.25, 7.251 and 7.252 of the Clerks Contract Document for the present Section 7.25 in the Longshore Contract Document. (Effective 7/1/73.)

(B) Applicable to Longshore & Clerks: Effective July 1, 1974 provide a maximum of four weeks vacation after seventeen years, and a maximum of five weeks vacation after twenty-three years (applicable to vacation qualification in 1974, payable in 1975).

(C) Applicable to Longshore & Clerks: Effective July 1, 1974 reduce the two week basic vacation requirement of 1344 hours to 1300 hours (applicable to vacation qualification in 1974, payable in 1975).

(D) Applicable to Longshore only: Effective July 1, 1974 reduce the 1600 hours requirement in 7.14 to 1560 hours (applicable to vacation qualification in 1974, payable in 1975).

(E) Applicable to Longshore & Clerks: Change Section 7.42 to provide for the distribution of vacation checks in the first week in April (applicable to vacations earned during the calendar year 1973, payable in 1974).

#### VI. HOLIDAYS

There shall be paid holidays as follows:

effective July 1, 1973—Christmas Day New Year's Day

effective July 1, 1974—Labor Day Thanksgiving Day Independence Day

On Labor Day, Thanksgiving Day, and Independence Day, a work force shall be available to meet the Em-

ployer's needs.

Christmas Day and New Year's Day shall be voluntary work holidays with work on a voluntary basis from 3:00 P.M. the day before the holiday until 7:00 A.M. the day after the holiday. An extended shift will be worked from 3:00 P.M. to 5:00 P.M. the day before the holiday for

the purpose of finishing a ship.

To be eligible for holiday pay employees must meet the availability requirements of the Pay Guarantee Plan for at least two of the five days, exclusive of the holiday, Monday through Friday for the week in which the holiday falls. (The Pay Guarantee Plan shall provide that if the holiday falls, or is observed, on Monday through Friday, availability will not be required on that day.) An employee shall not lose holiday pay because of his failure to meet the aforementioned requirement if such failure is due to his being:

1) on vacation,

2) verified sickness or injury.

Steady employees shall meet their weekly or monthly availability requirements to be eligible for holiday pay. Also employees must be registered on the date of the paid holiday to be eligible for holiday pay and have worked 800 hours in the prior calendar year, or the most recent year during which he could have done so in his port of registration.

Registered employees entitled to payment of the paid holiday shall receive payment of 8 hours at the basic straight time rate of pay regardless of whether or not they work. When registered men entitled to a paid holiday perform work on such holiday, their additional payment for working shall be as prescribed in Section 6.

Registered men, not entitled to a paid holiday, and non-registered men who perform work on any of the holidays listed above shall be paid for working as prescribed in Section 6.

Other holidays not enumerated above shall be observed as per Section 5.1 of the present Agreement.

NOTE: The foregoing Sections:

Section I Wages

Section II Pay Guarantee Plan

Section III Pensions

Section IV Welfare

Section V Vacations

Section VI Holidays

constitute the complete economic settlement between the parties for this two year Agreement.

#### GENERAL PROVISIONS APPLICABLE TO THE PACIFIC COAST LONGSHORE AND CLERKS AGREEMENT

(A) Mediation/Arbitration Process. This Agreement to be effective June 9, 1973, however, beginning June 11, 1973 the parties will continue bargaining to reach agreement on unresolved issues. Under the heading of unresolved issues are only those specific proposals and counterproposals made by the parties and still not settled as of this date.

On June 18, 1973 any unresolved issues outstanding will be discussed in a negotiations-atmosphere in the

presence of the Mediator/Arbitrator.

On June 25, 1975 any unresolved issues still outstanding will be presented to the Arbitrator for final and binding decision by him. The Arbitrator will be required to issue his decision on any issue presented to him no

later than June 30, 1973.

If any issues involving steady men are submitted to arbitration, it is agreed that the Arbitrator shall have neither the power nor the authority to delete Section 9.43 of the PCLCD or Section 5 of the Crane Supplement; it is further agreed that in deciding any issues under Section 9.43 and Section 5 of the Crane Supplement, the Arbitrator shall have the same authority as he had in deciding Section 9.43 and Section 5 issues at the conclusion of the 1971-72 negotiations.

- (B) Ratification. This Memorandum of Understanding is subject to ratification by both parties.
- (C) Governmental Agencies Approvals. Pension, Welfare and Pay Guarantee Plans are all subject to and conditional upon receipt of satisfactory tax rulings from appropriate Federal and state agencies. If unsatisfactory rulings are received, the parties will meet to make required changes in the Plan(s) to comply with the rulings.

(D) Term of Agreement. Amend Section 20.1 by changing the termination date to 8:00 A.M. July 1, 1975.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington:

/s/ Harry Bridges

Dated: June 9, 1978

PACIFIC MARITIME ASSOCIATION on behalf of its members:

/a/ Ed J. Flynn

## SUPREME COURT OF THE UNITED STATES No. 76-938

FEDERAL MARITIME COMMISSION, et al., PETITIONERS

2

PACIFIC MARITIME ASSOCIATION, et al.

ORDER ALLOWING CERTIORARI. Filed February 28, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

FEB 4

## MICHAEL RODAK, JR., CLE

In the Supreme Count

OF THE Anited States

OCTOBER TERM, 1976

No.76-938

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, Petitioners,

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONG-SHOREMEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, and PORTS OF ANACORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA, Respondents.

BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

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San Francisco, California 94103,

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# In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-938

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, Petitioners,

VS.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONG-SHOREMEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, and PORTS OF ANACORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA, Respondents.

BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the
District of Columbia Circuit

Pursuant to Rule 24, International Longshoremen's and Warehousemen's Union (ILWU) hereby files its brief in opposition to petition for certiorari.

#### JURISDICTION

ILWU does not challenge the jurisdictional statement in the Petition but urges that this Court exercise its discretionary power under 28 U.S.C. 1254(1) to deny the petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia.

#### QUESTIONS PRESENTED

To avoid unnecessary repetition, ILWU has been afforded the opportunity of reviewing a draft of the Pacific Maritime Association (PMA) Brief in Opposition to the Petition.

ILWU agrees with PMA that the first question presented by the Petition is not presented in this case and that a conflict between the courts of appeal does not now exist and will not exist unless a court of appeals for some other circuit should decide that the Federal Maritime Commission (FMC) has jurisdiction over a good-faith collective bargaining agreement. ILWU agrees that the first question as stated by PMA is the only question properly presented by the decision of the Court of Appeals for the District of Columbia.

For the purpose of argument only, and except for the manner in which the ILWU-PMA agreement is characterized, ILWU accepts the Petition's second question. That agreement does not "impose conditions on employers who are not parties to the agreement." The ILWU-PMA agreement at most "affects" the inthey might not otherwise have in their separate and independent negotiations with ILWU; the ILWU-PMA agreement does not foreclose those employers from requiring ILWU to bargain in good faith with respect to alternative uses of the industry's pool of registered dockworkers and alternative participation in fringe-benefit programs developed and maintained through industry-wide negotiations.

#### STATEMENT

ILWU accepts the statement of facts as presented in PMA's Brief, noting, however, that insofar as the Petition's first question may be involved, any differences between the statements of the Petition and PMA's Brief are irrelevant.

ILWU supplements PMA's statement in the following particulars:

Supplemental Memorandum No. 4 and the Revised Agreement adopted in 1972 and 1973 (the Agreement) negotiated between ILWU and PMA were the result of bona fide collective bargaining between the parties over an issue that had been troublesome for a number of years. (J.A. 189)

Some non-members had been participating in only some of the fringe benefits programs and PMA had accepted contributions from non-members on a piece-meal basis (J.A. 173, 176, 181, 189). Indeed, some non-member ports were not using the central pay

offices where the members of the bargaining unit received their checks. (J.A. 177, 213)

ILWU therefore made the first proposal in the 1972 negotiations that "PMA will accept all fringe benefit contributions from any employer (J.A. 170)." PMA's response was to propose the elimination of "non-member participation under any provisions of the Agreement." (ibid.) In the ensuing negotiations ILWU won its major demand: the Agreement provides that non-members shall participate in all the fringe benefit plans (Petition, 5a n.6). In order to prevail on that issue, ILWU agreed that the non-members should be treated as members were treated. Collective bargaining is not a one-way street and in order to achieve its main objective ILWU had to yield to some of PMA's demands, but it was a negotiated-for, arm's length deal.

Since the "prior restraint procedures of Section 15 [of the Shipping Act of 1916; 46 USC 814] (the Shipping Act) imposes such an extraordinary burden on collective bargaining" (Petition 2a), the court of appeals correctly held that the Agreement was outside the scope of that section. Because the decision of the court of appeals is consistent with this Court's decision in Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261 (1968); because it faithfully mirrors the legislative history of Section 15; and because it correctly states the public policy which governs in these maritime collective bargain-

ing/shipping/anti-trust situations, it does not require review by this court. New York Shipping Association v. Federal Maritime Commission, 495 F.2d 1215, 2nd Cir., 1974, cert. denied 419 U.S. 964 (1974) is distinguishable from the instant case and, upon analysis, is not in conflict with it.

#### REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. In Volkswagenwerk, this Court made it crystal clear that it was not dealing with a collective bargaining contract.

". . . it is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing of requirements of §15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing valdity. But in negotiating with the ILWU, the Assocation insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement, affecting only relationships among Asso-

<sup>&</sup>lt;sup>1</sup>Petitioners' formulation (Petition, 4) could leave the erroneous implication that the first proposal came from PMA.

ciation members and their customers, is all that is before us in this case. . . ." (390 U.S. at 278)<sup>2</sup>

No decision of this Court suggests that a collectively bargained agreement covering the terms and conditions of employment resulting from good-faith, "eyeball-to-eyeball" negotiations between a union certified as the collective bargaining representative of a unit of employees and a group of employers is subject to review and approval by an executive regulatory agency like the FMC. On the contrary, it is now clearly established that industry-wide bargaining by employers joined together within an association does not contravene any antitrust policies and is within the National Labor Relations Act. NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957); Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 283 (1968). Further, many decisions of this Court have confirmed that Congress has rejected a system of executive agency regulation for the settlement of labor-management problems and has encouraged and protected the free play of the collective bargaining process as the best means of achieving harmonious and stable labor-management relations.3 NLRB v. Insurance Agents' International, 361 U.S. 477, 488-90 (1960); see also, Teamsters Union v. Oliver, 358 U.S. 283, 295-96 (1959).

In the only decision of this Court in which a labor related agreement among maritime employers was found to be within the regulatory scheme of the Shipping Act and the jurisdiction of the FMC, this Court, as pointed out above, carefully limited the reach of the decision and explicitly emphasized that an agreement resulting from free collective bargaining between a union and employers was not subject to the jurisdiction and surveillance of the FMC under section 15 of the Shipping Act. Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, supra at 278. The decision of the court of appeals accords with the teachings of this Court and its specific admonitions in Volkswagenwerk and, therefore, does not present a substantial question for review by this Court.4

2. To avoid the inescapable conclusion that a substantial question is not involved, Petitioners assert that the decision of the Court of Appeals for the Second Circuit in New York Shipping Association v. Federal Maritime Commission, 495 F.2d 1215, cert. den. 419 U.S. 964 (1974) conflicts with the decision of the court of appeals in this case. Whatever difference of emphasis may exist between the decisions in the Second Circuit and the District of Columbia Circuit, such differences are not sufficient to convert an

<sup>&</sup>lt;sup>2</sup>Mr. Justice Harlan agreed: "... no collective bargaining agreement in the maritime industry is now before us ..." 390 U.S. at 287. See also, *ibid*. at 290.

<sup>&</sup>lt;sup>3</sup>Moreover, an early congressional experiment to subject labor-management relations in the maritime industry to the jurisdiction of a regulatory agency like FMC was soon abandoned. See Douglas, J., dissenting in Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n., supra at 296, 299-301.

The Court of Appeals for the First Circuit agrees with the Court of Appeals for the District of Columbia Circuit; the judges of the First Circuit expressed "astonishment" that anyone would assert FMC jurisdiction over a union and multi-employer agreement reached through "eyeball-to-eyeball" negotiations. Boston Shipp g Ass'n. v. United States, 8 S.R.R. 20,828 (1st Cir. May 31, 1572).

otherwise insubstantial question into one requiring the attention of this Court.

At the outset, it must be recognized that FMC had found in the New York Shipping Association case that the union's participation in development of the assessment formula in the collective agreement was merely "nominal," and the Court of Appeals for the Second Circuit fully appreciated that the substance of the challenged assessment formula incorporated in the collective bargaining agreement had been developed unilaterally by the employers in their own councils. Consequently, such provisions could not have been the product of "eyeball-to-eyeball" bargaining.

Significantly, the challenged provisions developed unilaterally by the employer group in the New York Shipping Association case involved an assessment formula, like the one in the Volkswagenwerk case, which resulted in a disproportionate impact on employers of maritime labor so as to produce discriminatory charges. Notwithstanding the relationship of such assessment formulae to labor interests, the shipping interests affected thereby were therefore held to be direct and immediate. In this case, the court of

appeals held that no direct and immediate shipping interest is threatened by the challenged ILWU-PMA agreement. The Agreement pertains to work opportunities and terms and conditions of employment of registered dockworkers represented by ILWU, a subject that directly and immediately affects labor interests and, at best, only indirectly and remotely affects shipping interests. The different impact of the contractual provisions challenged in this case and those challenged in the New York Shipping case sharply distinguishes the decision of the Court of Appeals for the District of Columbia Circuit from that of the Second Circuit.

That two different courts of appeals reached predictably different conclusions on different factual records hardly calls for this Court's intervention. This Court's business of resolving real conflicts is heavy enough; it should not have the additional burden of dealing with questions which the courts of appeals have quite properly disposed of on their separate and discrete facts and which, on analysis, present no basic conflict between circuits.

3. Petitioners are led to their position by refusing to recognize ILWU's direct interest in the non-member agreement negotiated with PMA. ILWU is certified by the NLRB to represent all dockworkers employed on the Pacific Coast. As such, it is directly concerned with maximizing the work opportunities of dockworkers and obtaining the full range of benefits of the pension, welfare, vacation, and pay guarantee

<sup>&</sup>lt;sup>5</sup>New York Shipping Association—NYSA—ILA Man-Hour/Tonnage Method of Assessment, 16 FMC 381, 389 (1973) aff'd sub nom. New York Shipping Association v. Federal Maritime Comm'n., supra.

New York Shipping Ass'n. v. Federal Maritime Comm'n., supra at 1216. The court observed that the union was "primarily" concerned with the collection of the assessments and that its lack of concern as to how the assessment formula allocated costs among employers was demonstrated by the fact that the assessment formula incorporated in the collective bargaining agreement "was not changed from the one that [the employers] had unilaterally adopted" previously. Ibid. at 1222.

<sup>7</sup>Shipowners Ass'n of the Pacific Coast, 7 NLRB 1002 (1938).

programs for them, regardless of how the cost is allocated and of whether or not the employer is a member of PMA.

ILWU had previously bargained with employers who are not members of PMA regarding their participation in these programs and had thereafter solicited PMA's consent to participation by such nonmembers. ILWU has, however, quite properly recognized that PMA's consent may not be compelled as a matter of right, but that PMA is entitled to withhold such consent unless ILWU will make appropriate concessions. This is the essence of collective bargaining. ILWU has appreciated that, as these programs have developed more cost significance in the ILWU contract settlements with PMA, PMA would seek ways to contain the costs thereof, one of which could be the contraction of the registered work force.8 ILWU has recognized that a further reduction in the registered work force would undoubtedly produce further impetus for decasualization of longshore employment and insistence by PMA members for preference in the employment of registered dockworkers whose economic security is primarily dependent upon ILWU-PMA contracts and programs. ILWU's concerns regarding the impact of these developments on the employees in the bargaining unit produced a difference of view with PMA. This difference of view led to a mediation and ultimately to eyeballto-eyeball negotiations between ILWU and PMA that produced the Agreement.

The court below, unlike the FTC, has fully appreciated ILWU's interests in these matters (Petition, Appendix Λ at p. 3a, fn. 1). By seeking a reversal of the court of appeals decision and a reinstatement of the FMC decision, Petitioners ignore these substantial labor interests.

Petitioners would, in addition, subject maritime collective bargaining to a unique regulatory system in which, whenever shipping interests became involved (howsoever remotely) with labor interests, the FMC would have jurisdiction to review and pass judgment on the labor-management settlement prior to its implementation. ILWU has no illusions as to how such reviews of its contracts will be undertaken by an executive agency on which sit only management, and no labor, representatives.

The FMC has no expertise in labor-management relations, as its handling of this case demonstrates. The FMC conclusion that the Agreement did not involve subjects for mandatory bargaining resulted, in part,

<sup>&</sup>lt;sup>8</sup>The Mechanization Agreement that spawned the Volkswagenwerk case has resulted in a significant contraction of the work force.

This view was expressed by Justice Harlan in Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, supra, at 283-291. However, it would appear that Justice Harlan believed such FMC judgment should result in granting for some labor agreements an exemption from application of the Shipping Act, 1916, Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, supra at 287. The court below stated that even if it were to adopt Justice Harlan's balancing test, the Agreement would be exempt from filing with the FMC (Petition, Appendix A at p. 35a). Moreover, a labor contract resulting from good faith bargaining was not before Justice Harlan and therefore the impact of the anti-injunction legislation and decisions discussed below was neither raised nor considered by him.

from its unfamiliarity with the responsibilities of a collective bargaining agent and the importance of fringe benefits to wage settlements.<sup>10</sup> It also resulted, in part, from an uninformed view of the function of a collective bargaining agreement.<sup>11</sup>

The FMC concluded that ILWU has no interest in the challenged portions of the Agreement because, inter alia, they promote the interests of the employer parties. The FMC obviously believes that a collectively bargained agreement can be bifurcated between union and employer interests. The realities are very different. A review of the Agreement (JA 452-454) will disclose a union interest in the subject of each clause thereof, notwithstanding the fact that the benefits to the employees have not always been maximized by the negotiated compromise of the parties. The process of give-and-take required by good-faith collective bargaining is designed, however, to produce agreements to which management and labor can give allegiance in their entirety as containing a workable solution to their disparate interests. Stability of labormanagement relations will hardly be achieved if, after strenuous eyeball-to-eyeball bargaining, one of the parties is denied the consideration supporting its agreement to the settlement. Such frustration of the operation of an agreement necessarily will result in its reopening with the unsettling effects which renegotiation will entail.

In addition, the FMC has been established to balance the economic interests of carriers and shippers, each of which has repeatedly condemned, as inimical to shipping interests, wage settlements negotiated by maritime unions. There can be little doubt that, if such an agency has jurisdiction to scrutinize the effects of maritime collective agreements, the contractual benefits won by maritime labor will soon be diluted. The FMC has already demonstrated its insensitivity to labor interests. While conceding that it lacks jurisdiction to regulate ILWU or any union as a person regulated by the Shipping Act, the FMC did not hestate in this case to nullify and render inoperative a collective bargaining agreement won by ILWU after hard bargaining.

There is little doubt that a procedure which forecloses implementation of a collective agreement absent agency approval substantially substitutes executive fiat for collective bargaining. Labor agreements involve dynamic matters, controlling as they do the economic welfare of thousands of families tied to an industry and, in many instances, such agreements determine the well-being of the entire community where these families reside. Delay in implementation can produce intolerable hardship. Petitioners appear to

<sup>10</sup> It is well settled that work opportunities and fringe benefits such as pensions are mandatory subjects of bargaining. National Woodworkers Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Hinson v. NLRB, 428 F.2d 133 (8th Cir. 1970); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948); cert. den. 336 U.S. 960 (1949).

<sup>11</sup> It should be noted that Commissioner Morse, former Chairman of the FMC and most experienced member of the present Commission, agrees that the agency lacks "expertise in the labor-management field" (Petition, Appendix A at p. 74a).

<sup>12</sup> New York Shipping Association, supra, 16 FMC at 391.

appreciate this fact but urge that there is a discretionary power in the FMC to grant interim approval which would be a sufficient safeguard of labor's interest (Petition, 16). They ignore, however, that, as shown by PMA's brief, this is a doubtful power, rarely exercised, and that it is more likely than not that the FMC will be persuaded to withhold interim relief by the very economic interests it has been constituted to protect.

Petitioners' position on this issue is that a process requiring advance approval of collective agreements in the maritime industry is preferable to the process which prevails in every other industry where collective agreements are immediately implemented and enforced until a federal court, after a full trial, finds a violation of antitrust laws (Petition, 16). Petitioners do not recognize that this view is unsupported by any provision of the Shipping Act or its history. Nor do they recognize that this view was not adopted by this Court in Volkswagenwerk. There this Court, noted that the case before it did not involve an agreement between ILWU and PMA but only an agreement among employers and specifically said it was not grafting onto the collective bargaining processes of the maritime industry the dilatory Section 15 procedures.

Moreover, Petitioners also ignore that a process requiring advance approval of maritime labor contracts by the FMC is tantamount to an automatic preliminary injunction restraining implementation of such agreements without any showing that they con-

tain substantive violation of law or that equitable considerations require such relief. This is in a dramatic contrast to the requirements of the Norris-LaGuardia Act, 29 U.S.C., § 101 et seq., which effectively withdraws from the federal courts jurisdiction to issue preliminary injunctions and temporary restraining orders with respect to labor activities and labor contracts merely because violations of the antitrust laws are alleged. See Milk Wagon Drivers' Union Local 753 v. Lake Valley Farm Products, Inc., 311 U.S. 91, 103 (1940). The adoption of Petitioner's position would constitute a reversion to use of the labor injunction: a use which has been discredited and abandoned by the development of the public policy embodied in federal laws regulating labor-management relations. United States v. Hutcheson, 312 U.S. 219 (1941). Such a reversion to repudiated practices is aggravated by the fact that an executive agency which by its charter and its structure is management oriented, may well exercise, if Petitioners prevail, a power that Congress concluded could not be entrusted even to the independent federal judiciary.18 It is a sensitivity to considerations such as these that is reflected in the decision of the Court of Appeals for the District of Columbia.

4. Nor is there any occasion for this Court to reconsider the lines drawn in the Volkswagenwerk

<sup>&</sup>lt;sup>13</sup>While the National Labor Relations Act has partially restored jurisdiction to the federal courts to grant injunctions in certain labor eases, the power is tightly circumscribed and limited to cases involving specific unfair labor practices under the National Labor Relations Act, as amended. See 29 U.S.C. §160(1).

case. If there is a need to protect shipping interests from illegal trade practices allegedly embodied in a collectively bargained labor agreement, the federal courts provide an adequate forum. Despite the very substantial reservations that ILWU has concerning the manner in which legitimate labor interests are once again being circumscribed by application of the antitrust laws, it agrees with the court of appeals that, if a line need be drawn between labor and antitrust policies, the district court in the district where the challenged activities have occurred or have their greatest consequences is the proper forum for that purpose. This Court very recently has withheld from the NLRB, despite its acknowledged expertise in labor affairs, jurisdiction over such line-drawing, apparently believing that the district court with its antitrust expertise is the preferred forum for the resolution of these problems. Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975). The same district court, because it also has expertise in federal labor law, possesses the comprehensive vision to deal with all aspects of these problems: a vision denied a specialized agency equipped only to foster the limited economic interests of a single industry.

5. The second question presented by the Petition need not be reached if the Court agrees that a substantial question is not presented by the first question. In such case, the balancing of interests that Petitioners maintain should be undertaken by the FMC may be pursued by the nonmember complainants in

the proceedings they have already instituted in the district court if the Agreement is indeed subject to condemnation under the principles enunciated in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

However, even if the FMC may have jurisdiction under Section 15 of the Shipping Act over agreements which result in discriminatory burdens affecting tariffs, it is clear that that statute affords no basis for permitting the FMC to balance antitrust, labor, and shipping interests in the manner it here attempted with respect to the Agreement. Petitioners, in an effort to justify the FMC's nullification of the Agreement, maintain that it "imposes" terms of employment upon employers who are not members of the employer group with whom ILWU has negotiated the Agreement. Such characterization of the Agreement misconceives the relationship between ILWU and such nonmembers.

By the Agreement, ILWU won the assurance for nonmembers of the opportunity to employ registered dockworkers on an equality with PMA members, notwithstanding that the latter have assumed the primary responsibility for the economic security of registered dockworkers. Also, nonmembers were afforded the opportunity of securing, on nondiscriminatory terms for the dockworkers employed by them, the advantages of the industry fringe-benefit programs. Whether nonmembers intend to take advantage of such opportunities depends upon the outcome of negotiations between them and ILWU, which has

not foreclosed itself from bargaining in good faith with nonmembers. That fact significantly distinguishes the Agreement from the agreement involved in the Pennington case, supra, under which the union allegedly bound itself to compel outsiders to accept specific, ruinous terms and conditions of employment.

The fact that the Agreement does not foreclose negotiations between nonmembers and ILWU has been recognized by the FMC; but the FMC erroneously presumed that nonetheless the Agreement imposes burdens on nonmembers. (Petition, 71a). However, the cost of using the registered work force and participating in the ILWU-PMA fringe-benefit programs may in fact be substantially less than the cost of any alternative proposals that nonmembers could develop. (JA 177, 188).

Apparently, FMC believed that nonmembers should first settle in their negotiations with ILWU the terms upon which they participate in ILWU-PMA programs and that ILWU could then compel PMA to accept those terms, notwithstanding that those terms favor nonmembers at the expense of PMA members and dockworkers; otherwise, there is no sense to the FMC condemnation of the Agreement that assures nonmembers access to industry fringe-benefit programs on equal and nondiscriminatory terms. This is indeed a curious view of what constitutes imposition of wage terms on outsiders to a bargaining group.

However, whatever the ultimate resolution of this question, it should be clear, as the court below held, that it does not involve shipping interests but

involves solely labor questions or at best the demarcation of labor and antitrust policies. It is also eminently clear that ILWU has a direct interest in how that question is resolved. Its resolution should not be undertaken by an agency that has no jurisdiction to regulate the activities of the ILWU. Clearly, a decision of the FMC that can deny ILWU the fruits of its collective bargaining is an effective regulation of ILWU activities.

To condone such an assumption of jurisdiction by the FMC over ILWU would deny to ILWU the right to be heard in the district court, the forum established by Congress for the determination of whether collective agreements violate antitrust policies. That denial is no small thing.

In the Norris-LaGuardia Act Congress substantially restricted the issuance by the district court of injunctions that preclude the implementation of collective bargaining agreements. Congress has said that in such a suit, legal, not equitable, remedies are available to persons claiming damage by illegal collective agreements; it has also said that in such a suit, the ILWU's right to a trial by jury will be protected by the Seventh Amendment<sup>14</sup> These important safeguards are wiped out if the FMC can act as petitioners propose here.

<sup>14</sup>Ross v. Bernhard, 396 U.S. 531, 533 (1970); Parsons v. Bedford, 3 Pet. 433, 446-447 (1830); Meeken v. Lehigh Valley R Co., 162 F. 354 (S.D.N.Y. 1908); see also Dairy Queen v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

Neither the important policies of the Norris-La-Guardia Act nor ILWU's fundamental civil rights should be lightly infringed; certainly not under a statute that has not heretofore been invoked for the regulation of labor activities and interests.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Dated, San Francisco, California, February 4, 1977.

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## In the Supreme Court of the MICHAEL R

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners

V

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, AND PORTS OF ANACORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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## In the Supreme Court of the United States

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FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

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V.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, AND PORTS OF ANACORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Respondent Pacific Maritime Association (PMA) urges that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case be denied.

## REFERENCES TO OPINIONS BELOW, TO JURISDICTION AND TO STATUTORY PROVISIONS

PMA adopts the references to opinions below, to the jurisdiction of this Court and to the relevant statutory provisions set forth in the petition for certiorari.

#### QUESTION PRESENTED

A union (ILWU) representing a work force pool of "registered" dockworkers, who work at times for various employer members of PMA and at other times for nonmember employers, negotiated a collective bargaining contract with PMA. The contract required PMA to permit any nonmember employer of registered dockworkers to participate in industry-wide fringe benefit programs administered by PMA and ILWU and conditioned nonmember employment of registered dockworkers on the employers participating in all the fringe programs, and accepting the same terms and conditions of employer access to the registered work force applicable to PMA members.

Certain nonmember employers contended that as a practical matter they would be forced "into accepting the same wage, fringe benefit and work stoppage terms as those negotiated by the multi-employer unit" (Pacific Maritime Ass'n v. Federal Maritime Comm'n, 543 F.2d 395, 409 (D.C. Cir. 1976); Pet. 1a, 36a) and that although the union was not subject to Shipping Act regulation, such a maritime labor agreement could not be implemented until approved by the Federal Maritime Commission ("the Commission") under section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) (Appendix A hereto).

The question presented is:

Whether an agreement collectively bargained by a union and an employers' association, not affecting tariffs or practices regulated by the Commission, presents Shipping Act section 15 questions of such importance that the balancing of labor and antitrust policy required to determine whether the agreement is labor exempt should be removed from federal district courts and committed to the Federal Maritime Commission under the pre-implementation approval/ antitrust exemption process of section 15.

#### STATEMENT OF THE CASE

PMA adopts the summary of the factual record set forth in the opinion of the court of appeals below at 543 F.2d at pages 396-99 (Pet. 3a-10a). The statement in the petition is misleading insofar as it relies upon certain conclusions of the Commission challenged by PMA and ILWU before the court of appeals. Such conclusions were implicitly rejected by the court, although the disposition of the case made it unnecessary to rule thereon.

The questions here are peculiar to the stevedoring industry in which registered dockworkers<sup>1</sup> rotate their employment among different employers and constitute a shared, finite industry resource. Registered dockworkers are the beneficiaries of complex and enormously expensive industry-wide fringe benefit programs administered by PMA and ILWU and developed over a genera-

<sup>1.</sup> International Longshoremen's and Warehousemen's Union (ILWU) represents all dockworkers within the bargaining unit described by the N.L.R.B. as "the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of . . . [PMA's predecessor]." (Shipowners Ass'n of the Pacific Coast, 7 N.L.R.B. 1002, 1041 (1938); See C. Larrowe, Shape-up and Hiring Hall 111 (1955).) Registered dockworkers are a delimited subset of the total ILWU-represented work force, entitled to priority in being hired by PMA employers and to extensive industry-wide fringe benefits. (See Pacific Maritime Ass'n and Mahoney, 140 N.L.R.B. 9, 12 (1962).)

The registration procedure by limiting the size of the work force, permits a high per capita income. Compare Larrowe, supra at 52, Table 2, with id. at 166, Table 5. The assignment of jobs on a strict rotational basis within registered classes stabilizes and equalizes the income. See Larrowe, supra at 144-48, 165-66. Some limitation on the size of the eligible class is necessary to the operation of a system of fringe benefits, and registration also serves that function. Control of registration lies with the labor relations committee in each port. (See ILWU v. Kuntz, 334 F.2d 165, 169 (9th Cir. 1964); ILWU (Waterfront Employers Ass'n), 90 N.L.R.B. 1021, 1050 (1950).)

tion. (J.A. 171-72.) These programs involve substantial long-term liabilities of PMA's membership as a whole. (J.A. 369.) Calculation and payment of benefits accrued by particular dockworkers and determination of particular employers' obligations depend upon PMA's central payroll and record keeping functions. (543 F.2d at 397, n. 2; Pet. 3a-4a, n. 2; J.A. 134, 172, 212-14.)

Basic problems follow from the foregoing facts. On days when nonmembers of PMA employ registered dockworkers, will the dockworkers continue to accrue ILWU/PMA plan benefits and, if so, how will this be financed? Should employers choosing not to join the association be permitted to participate in the fringe plans and, if so, should PMA run a fringe program for nonmembers on terms less onerous than for the members? ILWU's insistence, between 1970-72, on the nonmembers participating as of right in the fringe plans took these questions out of PMA's hands, but PMA did bargain for conditions on that participation.

Prior to 1972, nonmember employers of registered dockworkers participated in some or all of the fringe programs by negotiating with ILWU and PMA. PMA was not obligated to ILWU to permit such participation. Nonmember employers did not pay the full costs of administering the fringe programs. (543 F.2d at 397; Pet. 4a, 55a-56a; J.A. 172-73, 176, 369, 372.) Moreover, they were free to continue to use the joint industry resource—the registered work force—during strike or lockout occurring within the term of the labor contract and while PMA employers were shut down, thus encouraging ILWU whipsaw tactics. (543 F.2d at 397; Pet. 4a.)

The collective bargaining terms in issue arose in an opening ILWU bargaining demand of November 16, 1970, which read:

"XVI. Fringe Benefit Contributions

The contract provide that PMA will accept all fringe benefit contributions from any employer whether or not

such employer is a member of the PMA." (J.A. 170. See 543 F.2d at 397; Pet. 4a.) (Emphasis supplied.)

PMA did not acquiesce in this demand. Three weeks later PMA counter-proposed:

"XVI. Fringe Benefit Contributions

The Employers propose that all applicable Sections of the Agreement be amended to eliminate non-member participation under any provisions of the Agreement unless they are not permitted by law to become members of The Association. Further, the employers propose that all supplemental agreements [fringe benefit agreements] to the Coast Agreement be amended as of July 1, 1971, to exclude non-member participation." (Ibid.) (Emphasis supplied.)<sup>2</sup>

After strike, mediation and extensive bargaining (J.A. 169-71; 543 F.2d at 397, 399, 406; Pet. 4a-5a, 9a, 28a-29a) an ILWU/PMA compromise was reached. It required PMA to permit non-member participation in the fringe benefit programs as of right and any nonmember employer wishing to use the registered work force (as opposed to other ILWU dockworkers) to participate in all the fringe programs and share in all the associated costs. Non-member and member employers were guaranteed equality of access to the registered work force as well as to the PMA/ILWU

<sup>2.</sup> The PMA counter proposal would have given nonmember employers choices of joining PMA under PMA's open door membership policy, of negotiating and creating their own comparable fringe benefit programs for registered dockworkers, or of negotiating with ILWU for nonregistered dockworkers. Despite sworn testimony by ILWU that it would bargain with nonmembers for non-registered dockworkers, (J.A. 217-18) the Commission concluded that ILWU would probably demand that registered dockworkers be employed. That, and the costs to non-members of "going it alone", would mean that they had little practical choice but to accept the nonmember terms or become PMA members. This resulted in a finding of "imposition of terms" even though there were no findings of PMA/ILWU conspiracy or any other agreement for ILWU to impose the terms. (J.A. 530-31; Pet. 69a-70a.)

fringe programs, and ILWU whipsaw tactics were discouraged, as to disputes occurring during the contract term, by provisions precluding the furnishing of registered dockworkers to nonmember employers during strike against or lockout by PMA employers. (543 F.2d at 397-99; Pet. 4a-7a; J.A. 452-54; Appendix B hereto.)

Several nonmember employers attacked the agreement by bringing antitrust actions in federal district court (543 F.2d at 399, n. 11; Pet. 8a-9a, n. 11) and by filing a petition with the Commission seeking a ruling that the terms were analogous to those in Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261 (1968) (hereinafter "Volkswagen"), and could not be implemented without Commission approval under section 15 of the Shipping Act, 1916. The Commission obtained a stay of the antitrust actions, pending its own resolution of the Shipping Act and labor exemption issues. (J.A. 518; Pet. 51a.)

Section 15 precludes pre-approval implementation of certain agreements among carriers and terminal companies subject to the Act. It permits the Commission to disapprove such agreements on "public interest" and other regulatory grounds, to modify the terms or to approve and thereby exempt them from the antitrust laws. The Commission's regulations require submission of executed agreements and requisite copies in writing, together with evidence of the authority of the signing party (46 C.F.R. § 522.3) plus a statement of Shipping Act justification.8 (46 C.F.R. § 522.5.) Thereafter, assuming no protest requiring formal hearing4 and that the Commission believes that the standards of

the Act are met, the Commission approves the agreement. Otherwise it is handled as litigation, a process which, as here, can take years to resolve.

Contrary to the petition, which cites no source, the Commission has neither followed nor announced a "general policy promptly to grant interim approval to collective bargaining agreements in appropriate cases" (Pet. 16; see Pet. 10). In the only reported case, so far as we can determine, where a collective bargaining agreement received interim approval, such approval was granted nearly a year after the agreement was placed before the Commission, plus an unknown amount of time following actual union/ management agreement. (New York Shipping Ass'n v. Federal Maritime Comm'n, 495 F.2d 1215 (2d Cir.), cert. denied, 419 U.S. 964 (1974) (hereinafter "New York Shipping").) Further, where parties to an agreement deny the Commission's jurisdiction they cannot very well simultaneously invoke that jurisdiction by seeking interim approval. PMA and ILWU consequently did not do so here.

Although the Commission's Hearing Counsel and Commissioner Morse, dissenting, urged that the labor exemption questions were "foreign to its expertise" (543 F.2d at 398-99; J.A. 533; Pet. 8a, 74a), the Commission denied the exemption and asserted jurisdiction. It did so, based upon tests developed in an

Interim approval of "labor-related" cost allocation agreements has involved consent thereto by opposing parties and circumstances where assessments later found excessive could be reimbursed. Most collective bargaining provisions do not admit of this solution.

<sup>3.</sup> Proposed regulations for submission of section 15 agreements, which codify much recent administrative practice and which typify present section 15 approval realities immensely complicate and lengthen the approval process described above. These regulations are attached as Appendix C.

<sup>4.</sup> In Marine Space Enclosures, Inc. v. Federal Maritime Comm'n, 420 F.2d 577 (D.C. Cir 1969), the court reversed the Commission for approving a protested section 15 agreement without evidentiary hearing.

<sup>5.</sup> In the instance reported, the Commission granted interim approval to a collective bargaining provision involving Volkswagen-type cost allocations among employers, where it was possible to undo the effects of an interim approval through subsequent reimbursement of fringe benefit assessments. (New York Shipping Ass'n v. Federal Maritime Comm'n supra, at 1218.) Interim approval there was granted on June 12, 1973. The agreement was placed before the Commission July 31, 1972. The decisions do not reveal how much additional time elapsed between agreement at the bargaining table and formal presentation to the Commission. (See New York Shipping, supra, 495 F.2d at 1218 and the Commission's decision therein, 16 F.M.C. 381.)

earlier case purporting to distill this Court's decisions on the labor exemption question into four brief criteria. The Commission believed that the failure to meet any one of them was a ground for withholding the labor exemption.

The Commission determined that the instant collective bargaining terms forfeited the labor exemption. First, the Commission held that the nonmembers had no practical choice but to accept the terms and that denial of the exemption need not rest on findings of a conspiracy or other PMA/ILWU agreement to impose the terms. (J.A. 522, 525, 530-31; Pet. 58a, 62a-63a, 69a-70a.) Second, because the Commission believed that the ILWU had only an "incidental" interest in the terms, it ruled that they did not constitute mandatory bargaining subjects. (J.A. 525; Pet. 62a; see J.A. 520, 524, 530; Pet. 55a, 60a-61a, 62a, 69a.) The Commission made no finding as to the good faith, "eyeball to eyeball" nature of the bargaining (J.A. 523; Pet. 59a), although the evidence in support of such conclusions was uncontradicted. (J.A. 169-73, 185-88, 194-211, 216-17.) The Commission recited that it had weighed Shipping Act against labor interests (J.A. 530; Pet. 69a), but the only Shipping Act interests or competition effects "weighed" were not effects of the terms of the agreement but likely effects on nonmembers declining to be bound thereby, thus equating the question of "imposition" of the terms with the question of their competitive effects. (J.A. 530-31; Pet. 69a-70a.)

6. "1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are 'arms-length' or 'eyeball to eyeball'.

3. The result of the collective bargaining does not impose term on

entities outside of the collective bargaining group.

Although the Commission's conclusion that the terms were subject to section 15 approval was based on application of Volkswagen, there were no findings of any inter-employer cost allocation agreement having "pass through" effects on prices subject to regulation, which two courts of appeals have recognized as the "heart" of Volkswagen. (See n. 8, infra.)

ILWU and PMA challenged the Commission's conclusion that ILWU had little interest in the subjects bargained and the legal conclusion based thereon that the terms were not mandatory bargaining subjects. They attacked the Commission's conclusion that PMA and ILWU had imposed the terms on nonmembers, and they asserted that under this Court's rulings the Commission's findings were inadequate to support its conclusion that the labor exemption was forfeited. Finally, they challenged the Commission's distillation of this Court's labor exemption rulings as a mechanistic distortion of those rulings.

The court treated the subjects bargained as core labor subjects and found the Commission's findings of lack of union interest in the contract terms "highly questionable." (543 F.2d at 397, n. 1; Pet. 3a, n. 1.) The court held that, balancing labor and Shipping Act considerations, the instant collectively bargained terms were not subject to section 15, since, unlike Volkswagen and New York Shipping they did not produce discriminatory rates—"a primary concern of the [Shipping] Act . . . ."—while they did concern core labor issues. (543 F.2d at 409; Pet. 35a-36a.) Moreover, the challenge to the agreement—in essence that it would "allegedly force nonmembers into accepting the same wage, fringe benefit and work stoppage terms as those negotiated by the

The matter is a mandatory subject of bargaining, e.g., wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

<sup>4.</sup> The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management." (J.A. 522-23; Pet. 58a; see J.A. 530; Pet. 69a; United Stevedoring Corp. v. Boston Shipping Ass'n, 16 F.M.C. 7, 13 (1972).)

<sup>7.</sup> Unlike Volkswagen, where there was a finding of an additional cost of \$2.35 per auto necessarily passed on in the price (390 U.S. at 265-66), there are no findings here of any new costs for nonmembers in any particular amount, or of the economic or competitive significance, if any, of such costs. There are no findings of any price effects.

multi-employer unit" (543 F.2d at 409; Pet. 36a)—failed to state Shipping Act issues.

The court's rationale went beyond the instant agreement to emphasize that the section 15 line should be drawn between "labor-related" agreements affecting regulated prices (as in Volkswagen) and agreements actually "negotiated between union and management" (543 F.2d at 408-09; Pet. 34a), as here. The court stressed the inconsistency of the inherent delays and second guessing of the section 15 pre-implementation approval process with the realities of collective bargaining, the Commission's lack of labor expertise and the absence of anything in the history of the Shipping Act suggesting an intent to regulate labor agreements. Thus, the court concluded that challenges to a labor exemption for maritime labor/management negotiated agreements should be mounted in federal district courts under the antitrust laws, as with labor agreements of all other industries, regulated or not.

The court followed Volkswagen. Volkswagen held that the Commission had jurisdiction over an inter-employer agreement allocating fringe benefit costs, having "pass through" and arguably discriminatory effects on prices subject to Commission regulation, but "emphasized":

"We are not concerned here with the agreement creating the Association or with the collective bargaining argreement between the Association and the ILWU... Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity." (Volkswagen, supra, 390 U.S. at 278.) (Emphasis by the court of appeals; see 543 F.2d at 408; Pet. 33a-34a.)

#### REASONS WHY THE WRIT SHOULD BE DENIED

#### 1. The Case Does Not Present a Conflict Between Circuits or Facts and Issues Appropriate for Resolving a Future Conflict.

This case does not present facts or findings whose disposition under section 15 is subject to any conflict between the Second Circuit in New York Shipping and the District of Columbia Circuit here. The case is, therefore, not a suitable vehicle for resolving areas of possible future conflict between the underlying rationale adopted by the two circuits.

The only question as to which there is even arguably conflict between the two circuits is whether future Volkswagen-type inter-employer cost allocation formulae affecting regulated prices and inserted into collective bargaining contracts, are subject to section 15 or the antitrust laws. This case does not present those facts or that issue. It presents only contentions that nonmember employers were forced to accept "the same wage, fringe benefit and work stoppage terms" as PMA members. (543 F.2d at 409; Pet. 36a.) Nothing in New York Shipping suggests that the Second Circuit would have subjected the ILWU/PMA nonmember provisions to section 15. Because there is no conflict about dis-

<sup>8.</sup> In New York Shipping the court of appeals recognized that the "heart of Volkswagenwerk" was that the inter-employer agreement would "alter relations among shippers of various types of cargo" (495 F.2d at 1221) or, as the court here phrased it, "produced discriminatory tariffs." (543 F.2d at 409; Pet. 35a-36a.)

<sup>9.</sup> Participation in existing ILWU/PMA fringe programs on an equal basis with PMA members produces significant cost savings to nonmembers as compared to providing comparable fringe programs on their own. (J.A. 188, 190; see J.A. 177.) There are no findings and no evidence of any labor costs for nonmembers that are higher than for members similarly situated.

Although the petition asserts that there would be "higher costs to nonmembers than to members . . . " (Pet. 7) it simultaneously qualifies this assertion by conceding that it arises as a result of differing "operations and locality," of particular employers rather than from differing terms. (Id.) Of course identical terms or wage scales in any industry-wide contract usually result in differing ultimate labor costs as between one employer and another because of differing geographical, operational and managerial factors. These range from a particular employer's distance from the hiring hall in the case of travel time costs to the differing ability of employers to utilize labor efficiently or displace it with capital equipment so as to lower total wage costs. The important point is that there is no finding, evidence or contention here that the present terms would create any cost for a nonmember employer higher than for a PMA employer similarly situated.

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position of the present case the Commission is not placed in an "untenable position" (Pet. 12) nor is it subjected to conflicting directives or even dicta concerning section 15 treatment of the present provisions or, for that matter, of 99.5% of all maritime collective bargaining.

It is unlikely that the court of appeals here would disagree with the Second Circuit that Volkswagen requires section 15 approval for an inter-employer assessment formula inserted into a collective bargaining agreement without good faith bargaining on the formula. The court's rationale below was that section 15 excluded only agreements actually "negotiated" with the union. (543 F.2d at 396, 409; Pet. 2a, 34a.)

If there is any probable conflict between the two rulings and any dilemma for the Commission created thereby it is whether to apply the broad rationale of the court's decision here to a future case involving an inter-employer cost assessment formula affecting regulated prices and found to have been actually negotiated in good faith with the union. There is doubt, however, whether there is a conflict with the Second Circuit on that question either. New York Shipping was decided on a record in which the Commission had refused to make a finding whether the bargaining was in good faith, where the Commission had found that the union was included "as a nominal party to the assessment formula agreement" and where the union's interest was found to be confined to assurance of payment of benefits as opposed to any interest in the assessment formula. (New York Shipping Ass'n-NYSA/ILA Man-Hour/Tonnage Method of Assessment, 16 F.M.C. 381, 389, 391 (1973), aff'd, New York Shipping Ass'n v. Federal Maritime Comm'n, 495 F.2d 1215 (2d Cir.), cert. denied, 419 U.S. 964 (1974).) Had there been an administrative finding of good faith bargaining with the union on the assessment formula in New York Shipping and of union interest therein, 10 it is entirely possible that the Second Circuit would have excluded the agreement from section 15.

As the petition points out (Pet. 17), the court of appeals held that a balance of labor and Shipping Act interests compels exclusion of the agreement from section 15. This is the actual holding of the case as contrasted to the dicta or broad rationale on which the petition focuses. Understandably, the Commission desires an advisory opinion whether it should be guided by the broad rationale of the court of appeals here or by the rationale of New York Shipping when a future case arises involving an assessment formula bargained in good faith and which "compel[s] discriminatory rates". (543 F.2d at 409; Pet. 36a.) This case does not pose the question, and it is doubtful that New York Shipping poses it. If it should become necessary for this Court to resolve the question at all it should do so where the Court has the benefit of a case involving a Volkswagen-type agreement in a collective bargaining contract, findings below whether bargaining thereof was in good faith, and a record as to the union's interest in the terms. Because neither this case nor New York Shipping provides the appropriate case or record the issue is premature to resolve now.

#### The Court of Appeals Did Not Adopt a Per Se Rule; It Left Balancing of the Interests with the Federal District Courts.

The court held that the instant negotiated labor agreement was exempt from section 15, because it concerned "wage, fringe benefit and work stoppage terms" allegedly forced upon nonmembers

<sup>10.</sup> A union might have a vital interest in the assessment formula chosen. The New York Shipping case did not present a record enabling this determination, but it did cast very serious doubt on the ILA's interest there.

(543 F.2d at 409; Pet. 36a), not discriminatory tariffs. Neither the holding of the case nor the broader rationale respecting removal of negotiated labor agreements generally from section 15 is a per se rule which avoids balancing of competitive and labor interests. To the contrary, it is a determination that, as with every other industry, regulated or not, balancing should be performed under the antitrust laws by courts having both labor and antitrust experience. The Federal Maritime Commission is inexperienced in and unqualified to perform this function, a function not bestowed on any other regulatory agency.

Section 15's approval standards relate to regulated shipping rates and practices under semi-cartel conditions exempt from the antitrust laws. They do not state either labor standards or requirements for free competition. Since, as the petition concedes, the labor exemption for maritime labor agreements involves a balancing of labor policies with pro-competitive antitrust policies under *Pennington* and related cases (Pet. 19), not under some different Shipping Act test, it is anomalous to have that balancing performed by the Commission, under standards designed to perpetuate intrinsically noncompetitive rate or pooling agreements.

The other section 15 case involving a non-Volkswagen-type labor agreement demonstrates the Commission's lack of expertise. There, the Commission first held the incorporation papers of an employer's collective bargaining association subject to section 15 as well as a longshore gang allocation system. It did so on virtually the same grounds as in its decision here. (United Stevedoring Corp. v. Boston Shipping Ass'n, 15 F.M.C. 33

(1971).) The First Circuit, remanding on the Commission's own motion with "some reluctance", found the Commission's view of the union as being indifferent to the terms "plainly erroneous" and observed that:

"[I]n all frankness we are compelled to remark that our initial reaction to the Commission's ruling is one of astonishment." (Boston Shipping Ass'n v. United States, No. 72-1004 (1st Cir. May 31, 1972), 8 S.R.R. 20,828, 20,830.)

Recognizing the inconsistency of successful collective bargaining and subjecting the bargaining to pre-implementation approval by a non-labor agency, the First Circuit described the Commission's ruling as:

"... the maternal 'hang-your-clothes-on-a-hickory-limb-but-don't-go-near-the-water' adjuration, feel free to negotiate your bathing suit purchase, and mother will decide later if you can wear it." (Id. at 20,830.)<sup>12</sup>

On remand, the Commission reversed itself in all respects after distilling this Court's labor exemption decisions into four brief guidelines. (See n. 6, supra) (United Stevedoring Corp. v.

<sup>11.</sup> The assertion in the petition that the Shipping Act is a "surrogate for the antitrust laws" (Pet. 18, n. 14) is misleading in the present context. The Act is a surrogate for the antitrust laws insofar as Congress substituted regulation for competition in pricing of shipping services and as to certain competitive marketplace practices. It is not a surrogate for the antitrust laws in the sense that the Commission applies or can properly be expected to apply pro-competition antitrust policies to any great degree.

<sup>12.</sup> The court quoted from the Brief for the United States as follows:

"The process of collective bargaining involves a give-and-take, with one party making a concession on one subject in return for obtaining a concession on another subject. It is difficult, if not impossible, for the parties to make a meaningful judgment as to the kind of bargain they are negotiating if one or more of the key provisions on which agreement turns is subject to invalidation by the Commission. Moreover, the fact that Commission approval would have to be obtained before the agreement could be put into effect would necessarily delay—for the period of the Commission hearing and decision and possible court review—the implementation of the agreement; and this delay may, in turn, cause industrial strife." (Id. at 20,831.)

The maritime industry has for years been torn by labor strife. (See, e.g., Douglas, J., dissenting in Volkswagen, 390 U.S. at 297-304.) The last thing that maritime labor relations need is an additional element of uncertainty. (See 543 F.2d at 406-407; Pet. 282-292.)

Boston Shipping Ass'n, 16 F.M.C. 7, 13 (1972).) The Commission's mechanistic application of these tests here and its determination that failure to meet any one of them was a basis for revoking the exemption led the court below to caution the Commission that simply:

"parsing the Court decisions in this highly complex area may over simplify the balancing process required . . . ." (543 F.2d at 411; Pet. 40a.)

It is difficult to see how treating the maritime industry like other industries in leaving labor exemption questions to the federal courts defeats any Shipping Act objectives. The Act and its legislative history are silent on labor agreements of any kind. There is no suggestion therein that the maritime industry, alone among regulated industries, should have its labor relations subject to advance approval by the governmental body regulating industry rates. (543 F.2d at 406; Pet. 28a.) The Commission itself previously recognized that labor matters were at best peripheral to its regulatory concerns:

"While we cannot here decide that every such collective bargaining agreement is entitled to a labor exemption, Hearing Counsel and the Department of Justice recommend... a rulemaking proceeding in order to exempt for the future this class of agreements from some or all of the requirements of section 15 of the Shipping Act, 1916, thereby not jeopardizing collective bargaining by any threat of preapproval implementation penalty. This we intend to do." (United Stevedoring Corp. v. Boston Shipping Ass'n, supra, 16 F.M.C. at 15.) (Emphasis supplied.)

This subject remained the least of the Commission's concerns as no rule making was ever announced, leading Commissioner Morse, dissenting here, to demand: "I again ask WHEN is this Commission proposing to initiate such a proceeding?" (J.A. 533, n. 20; Pet. 74a, n. 20.) (Emphasis in original.)

## 3. The Posture of the Case Does Not Present Pennington/Jewel Tea Questions.

The petition does not state that the case presents the Court with an important question concerning the scope or the application of the labor exemption. It concludes, however, that "on the basis of *Pennington* and related cases . . . . no labor exemption should have been applied . . . ." (Pet. 19-20.)

The court of appeals, of course, did not "apply" a labor exemption to the agreement. In view of its disposition of the case, it did not have to decide specifically that the Commission's resolution of *Pennington* questions was erroneous, although this was a contention vigorously argued by PMA and ILWU. As a consequence, in the posture of the case here, *Pennington* contentions alluded to in the petition are not ripe for consideration and are not grounds for granting the writ.

The court of appeals determined that the nonmember objections to the PMA/ILWU agreement were in essence objections that an improper bargaining unit was imposed, a question under the labor laws within the expertise of the NLRB and presenting "at worst . . . Pennington considerations" for a federal district court to resolve. (543 F.2d at 410; Pet. 37a.) Further, the court made clear that the Commission's denigration of ILWU's interest in the terms bargained—the basis for the Commission's ruling that the contract terms were not mandatory bargaining subjects—was "highly questionable". 14 (543 F.2d at 397, n. 1; Pet. 3a, n. 1.)

<sup>13.</sup> United Mine Workers v. Pennington, 381 U.S. 657 (1965); Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965). Only if the Court were to grant the petition and further were to disagree with the court of appeals' disposition of the case would it reach the Pennington questions argued below. Even then the Court should first obtain the benefit of the court of appeals' resolution of those issues.

<sup>14.</sup> Even if, unlike here, the terms involve significant market restraints, they are labor exempt if they have a "substantial effect" on wages,

The Pennington issues, 18 referred to throughout the petition but not directly posed, are based on Commission conclusions which were the subject of a vigorous, lengthy but necessarily unresolved argument before the court of appeals. Even assuming it were necessary and important for the Court to resolve these issues they should first be resolved by the court below. But in any event, the court of appeals' de facto rejection of the Commission's denial that the terms were mandatory subjects of bargaining and the court's "caution" to the Commission against its mechanistic "parsing the Court decisions in this highly complex area" and against oversimplification of the required balancing process (543 F.2d at 411; Pet. 40a) make the petition's reliance on the Commission's Pennington conclusions, an unacceptable basis for review in this Court.

hours, or other subjects of union concern (Federation of Musicians v. Carroll, 391 U.S. 99, 112 (1968)) or are:

"so intimately related to wages, hours and working conditions that the union's successful attempt to obtain that provision through bona fide arm's length bargaining [is] in pursuant of their own labor policies, and not at the behest of or in combination with non-labor groups." (Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-90 (1965); see Associated Milk Dealers, Inc. v. Milk Drivers Union, 422 F.2d 546 (7th Cir. 1970); Dolly Madison Industries v. Teamsters Local 592, 182 N.L.R.B. 1037 (1970).)

Of course, no question of forfeiture of a labor exemption properly arises unless at a minimum there are findings that the bargaining terms fixed prices, divided markets, imposed ruinous predatory terms on other employers or otherwise involved market restraints of significant magnitude. (United Mine Workers v. Pennington, supra; Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797 (1945); see Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 625 (1975).) This case comes here with no such findings and without evidence which would support such findings.

15. PMA and ILWU vigorously contested the Commission's conclusion that the terms were not mandatory bargaining subjects, the finding that the nonmember terms would, as a practical matter, be imposed, the conclusion that no conspiracy or other agreement to impose the terms was necessary to revoke the labor exemption, the statement implying that there were higher costs for nonmembers than for members because of geographical considerations and the conclusion that a labor exemption could be revoked without a finding that the bargaining was not in good faith and in the face of uncontradicted evidence that it was in good faith.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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LILLICK MCHOSE & CHARLES

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EDWARD D. RANSOM

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February 4, 1977

#### CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief in Opposition to Petition for a Writ of Certiorari for Petitioner Pacific Maritime Association upon all parties by causing three (3) copies thereof to be mailed, postage prepaid and properly addressed, to each of the counsel of record.

Executed this 4th day of February at San Francisco, California.

R. FREDERIC FISHER

#### Appendix A

#### Section 15 of the Shipping Act, 1916 (46 U.S.C. § 814):

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between con-

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ferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be subject to a civil penalty of not more than \$1,000 for each day such violation continues: Provided, however, That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or cancelled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

#### Appendix

#### Appendix B

#### IX. ILWU-PMA NONMEMBER PARTICIPATION AGREE-MENT

The "ILWU-PMA Nonmember Participation Agreement" is revised as follows:

ILWU-PMA NONMEMBER PARTICIPATION AGREEMENT

The PMA-ILWU jointly registered work force (hereinafter referred to as the "joint work force") exists as a result of the registration process beginning in 1935 under successive Pacific Coast Longshore and Clerks Agreements (herein called "PCLCA") and the Walking Bosses and Foremen's Agreement. These agreements have been between the Pacific Maritime Association and its predecessors (PMA) and the International Longshoremen's and Warehousemen's Union and its longshore, clerks and walking bosses/foremen's locals in California, Oregon and Washington (ILWU). The men in the joint work force have "jobs" in which they work on an interchangeable basis for the many business entities involved in or related to the movement of cargo to and from ships in California, Oregon and Washington. Some of these business entities are not members of PMA. The following provisions apply to such nonmembers of PMA.

- A business entity not a member of PMA must participate in this ILWU-PMA Nonmember Participation Agreement if it uses men in the joint work force.
- The nonmember participant's separate ILWU contract must conform with the provisions hereof, and the provisions of the PCLCA governing the selection of men for inclusion in the joint work force.
- A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA.

For example a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA.

b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, nonmember participants shall not obtain men from the dispatch hall,

c) if during a work stoppage by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch hall for PMA members, such limited dispatch shall be available to nonmember participants.

The essence of b) and c) of this section is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against nonmember participants.

- 4. Should any nonmember participant cease to have the right to obtain men through the allocation and dispatching system, such nonmember shall nevertheless continue under a duty to meet all of its obligations based upon its use of the joint work force including accrued obligations for PMA assessments and dues, obligations for retroactive and current assessments for fringe benefits, obligations to meet liabilities under paragraph 10 hereof, and all other obligations with respect to the pay of workers paid through the central pay office during the period of its participation in the use of the joint work force.
- 5. A nonmember participant may obtain and employ a man in the joint work force on a steady basis in the same way a member may do so. When such participant employs a man to work on a steady basis, it shall notify PMA immediately. On request from PMA, each such participant shall furnish to PMA a list of men it is using on a steady basis. Steady men shall partici-

pate in the Pay Guarantee Plan in accordance with the rules that are adopted by PMA and ILWU.

6. For purposes of 1.53 through 1.57 of the Container Freight Station Supplement (CFSS) of the PCLCA, a nonmember participant who uses the joint work force at terms and conditions of employment no more favorable to the nonmember participant than those provided under the PCLCA, including the CFSS, may be deemed to be a "member of PMA" insofar as it is so using the joint work force.\*

7. The nonmember participant shall participate in the ILWU-PMA Pension Plan, the ILWU-PMA Welfare Plan, the PMA Vacation Plans (longshoremen and clerks, and walking bosses/ foremen) and the ILWU-PMA Guarantee Plans (longshoremen and clerk/and walking bosses/foremen) in accordance with the terms applicable to such participation. Such nonmember shall make payments into these Plans at the same rates and at the same times as members of PMA are to make the respective payments. Attached are statements of terms and conditions currently in effect with respect to such participation. Nonmember Participants shall be subject to the same audits as members of PMA.

8. The nonmember participant shall use the PMA central pay system and central records office and must sign the standard forms of participation documents for the central records office and central pay system. Amounts due with respect to the central pay and central records system shall be paid to PMA at the time and in the manner prescribed for members of PMA.

Note: The hours for which pay is distributed through the central pay office to any man within the joint work force, with respect to his being used by such nonmember pursuant to the terms hereof, shall be demed hours of work for a PMA member company for purposes of determining the individual longshoreman's eligibility for vacations, welfare, pensions, pay guarantee, promotion, transfer, advancement in registered status, seniority, and all other aspects of his work history as a member of the joint work force.

9. Each nonmember participant shall pay to the PMA an amount equal to the dues and assessments on the same basis that a PMA member would pay. Payments shall be made at the same time the member would pay.

10. If a nonmember participant becomes delinquent under paragraphs 7, 8, or 9 hereof no joint work force workers shall be furnished to the delinquent nonmember.

11. It is believed that all provisions of this agreement are now lawful, and it is assumed that they will continue to be lawful. Should there at any time be a determination that any portion of this agreement is contrary to law, the remaining provisions shall continue to be binding upon the parties unless ILWU or PMA gives notice of the termination of this entire agreement.

12. The ILWU-PMA Nonmember Participation Agreement shall be binding and continue in effect until terminated on such terms and conditions as may be mutually agreed to by the PMA, the ILWU and the participant. An entity that terminates its participation shall at such time no longer be eligible to employ men in the joint work force nor to participate in the Pension, Welfare,

<sup>\*</sup>As a result of decisions of the NLRB in other cases, the incorporated "CFSS" provisions of the PCLCA and hence of clause 6 are inapplicable. (ILWU (California Cartage Co.), 208 N.L.R.B. 986, 994 (1974), aff'd without opinion, 515 F.2d 1017, 1018 (D.C. Cir. 1975) cert. denied ..... U.S. ....., 47 L.Ed.2d 347 (1976).)

(Participant)

Approved by
PACIFIC MARITIME ASSOCIATION
on behalf of its members

Approved by INTERNATIONAL LONG-SHOREMEN'S AND WARE-HOUSEMEN'S UNION, on behalf of itself and all longshore and clerks locals in California, Oregon and Washington

### Appendix C

#### Regulations for Filing Section 15 Agreements Proposed as 46 C.F.R. § 522.5 (41 Fed. Reg. 51622-23 (Nov. 23, 1976))

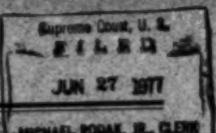
Section 522.5, Supporting Statements and Evidence

(a) All applications for approval of agreements pursuant to section 15 of the Shipping Act, 1916, shall be accompanied by a statement which sets forth the purpose of the agreement and the particular circumstances which necessitate the agreement.

(b) In addition to the requirements of paragraph (a) of this section, any agreement providing for (1) fixing or regulating of transportation rates or fares; (2) controlling, regulating, preventing or destroying competition; (3) pooling or apportioning earnings, losses, or traffic; (4) allotting ports or restricting or otherwise regulating the number and character of sailings between ports; or, (5) limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; shall be accompanied by evidence demonstrating the serious transportation need requiring the agreement, or the important public benefits which the agreement is necessary to secure, or the valid regulatory purpose of the Shipping Act of which the agreement is in furtherance. As used in this paragraph, evidence includes affidavits of fact made by persons having knowledge of the matters contained therein and authenticated documents such as, for example, records kept in the ordinary course of business. Evidence does not include arguments, opinions and conclusions of counsel.

(c) In addition to the requirements of paragraph (a) of this section, any application for the approval of an agreement which appears to be violative of the antitrust laws and which provides for (1) giving or receiving of special privileges or advantages, or (2) any exclusive, preferential, or cooperative working arrangement, shall also comply with the requirements of paragraph (b) of this section.

- (d) Any application for approval of agreements pursuant to section 15 which fails to comply with the provisions of this section shall be returned without action and without prejudice to resubmission in compliance with the requirements of this section.
- (e) (1) All protests against the approval of agreements filed pursuant to section 522.3 shall be accompanied by (i) a statement which: (A) specifies the position of the protestant in regard to the approvability of the agreement protested, and all constituent parts thereof; (B) identifies, with particularity, the reason or reasons why the agreement protested should not be approved; (C) admits or denies the existence of the need, benefit, or purpose submitted in accordance with paragraphs (b) or (c) of this section by the parties to the agreement protested; (D) alleges facts which support the reasons identified pursuant to (B) of this subdivision; and, (ii) any evidence tending to prove the allegations made pursuant to this paragraph.
- (2) Failure to comply with the requirements of this paragraph shall result in the Commission's consideration of the agreement protested without regard to the protest. Such Commission action shall not, however, preclude the protestant from seeking leave to intervene under section 502.72 of Part 502 of this chapter, in any proceeding arising out of such consideration.
- (f) Where the supporting statements and evidence submitted under paragraphs (a), (b), (c) and (e) of this section are deemed insufficient or incomplete, the Commission may, in lieu of the actions permitted under paragraphs (d) and (e) (2) of this section, require the submission of additional data or information.



In the Supreme Court of the

OCTOBER TERM, 1976

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, PETITIONERS

100

PACIFIC MARITIME ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR THE FEDERAL MARITIME COMMISSION AND THE UNITED STATES

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## In the Supreme Court of the United States

OCTOBER TERM, 1976

### No. 76-938

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, PETITIONERS

v.

PACIFIC MARITIME ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL MARITIME COMMISSION
AND THE UNITED STATES

#### OPINIONS BELOW

The opinion of the court of appeals (A.P. 1a-42a) is reported at 543 F. 2d 395. The opinion of the Federal Maritime Commission (A.P. 45a-79a) is not yet reported.

### JURISDICTION

The judgment of the court of appeals (A.P. 43a-44a) was entered on August 27, 1976. The Chief

<sup>1 &</sup>quot;A.P." refers to the Appendix to the petition for certiorari.

Justice on November 19, 1976, extended the time within which to file a petition for a writ of certiorari to January 5, 1977. The petition was filed on that date and was granted on February 28, 1977 (App. 316). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

- 1. Whether national labor policy requires exemption of collective bargaining agreements as a class from the filing and approval requirements of Section 15 of the Shipping Act, 1916, 46 U.S.C. 814.
- 2. Whether, assuming national labor policy does not require such a blanket exemption, the part of a collective bargaining agreement at issue in this case, which imposes conditions on employers who are not parties to the agreement, is nevertheless exempt from those requirements.

## STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 et seq., are set forth in the Appendix to the petition for a writ of certiorari (A.P. 80a-86a).

### STATEMENT

This case involves the jurisdiction of the Federal Maritime Commission over a collective bargaining agreement between the Pacific Maritime Association ("PMA"), a multi-employer bargaining organization for shipping and port interests, and the International Longshoremen's and Warehousemen's Union ("ILWU"). The agreement (App. 290-293) establishes conditions under which organizations that are not members of PMA can utilize ILWU workers and can use PMA facilities such as PMA-administered fringe benefit programs and central payroll operations.

Eight municipal corporations that own and operate marine terminal facilities in the States of Oregon and Washington ("the ports") in competition with PMA members, and which are not members of the PMA, filed a complaint with the Federal Maritime Commission alleging that, under Section 15 of the Shipping Act, 1916, 46 U.S.C. 814, this agreement required Commission approval prior to its implementation, that the agreement had not been filed with or approved by the Commission, and that the agree-

<sup>2</sup> The ports are Anacortes, Bellingham, Everett, Grays Harbor, Olympia Port Angeles, Portland, and Tacoma (App. 9). The Port of Seattle subsequently intervened on the side of the ports.

The Council of North Atlantic Shipping Associations ("the Council"), the International Longshoremen's Association ("ILA"), and Wolfsburger-Transport Gesellschaft, m.b.H. ("Wobtrans") intervened in the proceedings before the Commission. The ILA, Wobtrans, and members of the Council were concurrently involved in other litigation before the Commission involving the scope of the labor exemption to the Shipping Act. New York Shipping Association—NYSA-ILA Man-Hour Tonnage Method of Assessment, 16 FMC 381, affirmed, 495 F. 2d 1215 (C.A. 2), certiorari denied, 419 U.S. 964. The Council, an East Coast employers' organization, also participated before the court of appeals in this case.

ment could not be approved under Section 15 because of its detrimental effects on competition in the ship-

ping industry (App. 9-11).3

The Commission ordered an investigation (App. 9-14) to determine whether the agreement was required to be filed under Section 15; whether it violated Section 16 of the Shipping Act, 1916, 46 U.S.C. 815, by "subject[ing] any person, locality or description of traffic to undue or unreasonable prejudice or

<sup>3</sup> Section 15 (A.P. 80a-83a) requires "[e]very common carrier by water, or other person subject to [the Act]" to "file immediately with the Commission a true copy \* \* \* of every agreement with another such carrier or other person subject to [the Act] \* \* or modification or cancellation thereof, to which it may be a party or conform in whole or in part \* \* \* controlling, regulating, preventing or destroying competition \* \* \*."

The Commission is required, after notice and hearing, to disapprove, cancel or modify any agreement that it finds to be 1) unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports; 2) to operate to the detriment of the commerce of the United States; 3) to be in violation of the Act (including Section 16, 46 U.S.C. 815 (A.P. 83a-85a), which prohibits, among other practices, giving undue preference or advantage to (or subjecting to undue disadvantage) any person, locality, or description or traffic, or Section 17, 46 U.S.C. 816 (A.P. 85a-86a), which prohibits charges that are unjustly discriminatory between shippers or ports or establishing, observing or enforcing unjust or unreasonable regulations or practices relating to "the receiving, handling, storing or delivering of property"; or 4) to be contrary to the public interest.

Section 15 exempts agreements approved by the Commission from the antitrust laws. The implementation of any agreement subject to the Commission's jurisdiction that the agency has not approved or has disapproved violates the Act and subjects the offender to civil penalties of up to \$1,000 per day for each day the violation continues.

disadvantage"; or whether it violated Section 17 of that Act, 46 U.S.C. 816, because it "will result in any practice which is unjust or unreasonable" (App. 12-14). PMA thereafter conditionally submitted the agreement to the Commission for approval (App. 15).

The Commission severed for expeditious determination the issue of its jurisdiction over the agreement (App. 23), and held that the agreement was subject to filing under Section 15, and not exempt, as PMA and the ILWU contended, because it involved labor-management relations (A.P. 45a-79a). PMA and the ILWU challenged this determination in the United States Court of Appeals for the District of Columbia Circuit, which reversed the Commission's ruling on jurisdiction.

### A. THE LABOR-MANAGEMENT ARRANGEMENTS AND AGREEMENTS IN THE PACIFIC COAST MARITIME INDUSTRY

PMA represents some 120 steamship companies, terminal operators, stevedores, and related companies doing business on the Pacific Coast, excluding Alaska, in negotiating and implementing contracts with the ILWU (App. 9, 87). Ocean carriers have voting control of the organization, although they are not direct employers of longshoremen. In 1938, the National Labor Relations Board designated "the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members

<sup>&#</sup>x27;App. 64-65; Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 267, n. 10; Shipowners' Association of the Pacific Coast, 7 NLRB 1002, 1016-1017.

of [PMA's predecessor organizations]" as an appropriate bargaining unit, and certified the ILWU as bargaining representatives of those employees." Then as now, however, some small employers of longshore labor were not members of PMA."

Because individual longshoremen generally do not work steadily for single employers, PMA and ILWU have established institutions to provide job security and employment procedures on an industry-wide basis. Since 1935, PMA and the ILWU have jointly established and administered hiring halls where ILWU members register and from which they are drawn for work assignments (App. 89). PMA has

established a central payroll and record-keeping system for these longshoremen (App. 89).

The employees also participate in various fringe benefit programs negotiated between PMA and ILWU, including a pay guarantee program, pension and welfare plans, and vacation allowances, which PMA administers (*ibid.*). PMA acts as one of the joint trustees of the fringe benefit funds to which all members of PMA contribute, so that the benefits are not affected by the withdrawal of individual employers from the industry (App. 89, 120, 207).

Prior to the agreement involved here, employers who were not members of PMA could secure long-shoremen from the joint work force through the ILWU-PMA hiring halls and participate in the ILWU-PMA fringe benefit plans, by negotiating separate contracts with the ILWU and supplemental participation agreements with PMA and ILWU (A.P. 3a; App. 89). The nonmembers paid specified fees to defray administrative expenses, and contributed to the fringe benefits funds in which they participated, but were not required to use all the administrative services of PMA (such as its central records and pay offices). In addition, the nonmembers could

Shipowners' Association of the Pacific Coast, supra, 7 NLRB at 1040-1041.

<sup>6</sup> Id. at 1014-1015.

For the union, the registration procedure permits a higher per capita income by limiting the size of the workforce. Larrowe, Shape-Up and Hiring Hall, 52 (U. Calif. Press, 1955). In conjunction with the practice of assigning jobs on a strict rotational basis within registered classes, it stabilizes and equalizes members' incomes. See id. at 144-148, 165-166. For employers, registration provides a relatively reliable work force (id. at 154-158).

<sup>&</sup>quot;Hiring halls dispatch "subsidiary" registrants with limited registration and "casual" men as well as fully registered workers. (Fully registered workers have priority in assignments over "subsidiary" registrants). See Pacific Maritime Association, 140 NLRB 9, 11-12. Since the agreement involved in this case applies to the "jointly registered work force" (App. 290), it appears intended to restrict access to fully registered men and subsidiary registrants to the extent that they are employed through the joint PMA-ILWU hiring hall. It also controls access to non-union em-

ployees who utilize the hiring hall as well as union employees; (use of hiring hall and registration status are independent of union membership, In re International Longshoremen's and Warehousemen's Union, et al. (Waterfront Employers Ass'n), 90 NLRB 1021, 1024-1025).

<sup>\*</sup>Those nonmembers include not only the ports but also such longshore employers as grain elevators (App. 44) and stevedoring firms (App. 90-91).

negotiate with the ILWU the extent to which they would participate in the fringe benefit programs (App. 96, 120-121). The ILWU allowed some non-members to retain substantially steady workforces, although it requires rotation of nearly all the men working for PMA (App. 96).

PMA told the Commission that it believed the non-member's use of registered men gave them a competitive advantage over PMA members (App. 90). Non-members could use registered men but did not suffer the consequences of labor disputes between PMA and ILWU; nonmembers have taken over PMA members' work while the ILWU struck PMA (App. 90, 95-98). In addition, PMA believed that the steady work forces of some nonmembers gave them greater efficiency, and a preference in allocations of longshore workers in times of labor shortage (App. 96).

Accordingly, the PMA Board of Directors in March 1970, resolved that nonmembers of PMA who are eligible for membership and employ workers from the same unions, "will not be allowed to share in the use of the facilities and services that PMA operates individually \* \* \* [or] jointly with unions \* \* \*" (App. 97-98, 104). No immediate action was taken on the resolution, however, because it would require union concurrence (App. 98).

The ILWU was aware of the resolution, and when contract negotiations started in November 1970, it included in its proposal a demand that "PMA will accept all fringe benefit contributions from any employer," including nonmembers of PMA (App. 98). In December 1970, PMA presented its counterproposal: to eliminate all nonmember participation in the hiring hall and fringe benefits under the master agreement between PMA and the ILWU. These proposals were discussed to some extent, but negotiations were at first dominated by economic issues, which resulted in a strike (App. 99). Negotiations on nonmember participation were resumed after the strike. After the exchange of several drafts (App. 100), PMA and ILWU adopted the first Nonmember Participation Agreement, identified as "No. 4, Supplemental Memorandum of Understanding," on April 25, 1972 (App. 99, 260-265 (text)).

In the interim, PMA had informed nonmembers of its initial negotiating position, and by letter and by personal visits had invited them to join the Association (App. 65, 157-158). The ports declined to do so.

The ports participate in all of the PMA fringe benefit plans (under the terms of their own collective bargaining agreements) and administrative services, except for three of the smaller ports that do not use the central payroll office (App. 120-121).

The union favors the rotational system because it ensures that available work is spread among the registered work force. Cf. Larrowe, supra, note 7, at 143. Employers believe that rotation reduces their efficiency somewhat by constantly providing different employees who must be familiarized with the employer's operations and by increasing employee travel time (id., at 159-160).

<sup>13</sup> PMA also claims that the partial participation of nonmembers in administrative and fringe benefit programs is an administrative burden (App. 89-90).

After the agreement was adopted, PMA and ILWU sent a joint letter to nonmembers requesting them to sign the agreement or lose the use of the joint work force (App. 77-78). The ports, as nonmember employers, declined, and filed a complaint with the Commission.

In 1973, while this proceeding was pending before the Commission, PMA and ILWU revised parts of the Agreement. The Revised Agreement, as well as the underlying collective bargaining contract, became the subject of the Commission's decision (A.P. 48a-49a; App. 290-293 (text)).

The Revised Nonmember Participation Agreement (App. 290-293)<sup>12</sup> of which the ports complain establishes ten conditions for a nonmember's use of the jointly registered work force: (1) the nonmember need not become a PMA member, but must participate in the nonmember participation agreement; (2) its separate ILWU contract must conform "with the provisions [of the Revised Agreement], and the provisions of the PCLCA [Pacific Coast Longshore and Clerk's Agreement] governing the selection of men for inclusion in the joint work force"; (3) it must share in the use of the work force "upon the same

terms as apply to members of PMA," including obtaining men from the dispatch hall through the allocation system operated by PMA and ILWU and ceasing or limiting use of men from the dispatch hall during work stoppages by ILWU against PMA, to the extent PMA's use is limited; (4) it must pay financial obligations accrued during its use of the registered work force if its right to use is terminated; (5) it must use a steady work force "in the same way a member may do so"; (6) in order to have constructive status as a "member of PMA" for purposes of the Container Freight Station Supplement ("CFSS") (see App. 237-241), it must use the joint work force on terms no more favorable than those provided under the Pacific Coast Longshore and Clerk's Agreement, including the CFSS: " (7) it must participate in all of the fringe benefit plans for longshoremen, with contributions to be made "at the same rates and at the same time as members of PMA"; (8) it must use the PMA central pay system and records office, subject to the same assessments; (9) it must pay PMA an amount equal to the dues and assessments on the same basis that a PMA member would pay, and at the same time; (10) delinquency under

The Nonmember Participation Agreement has not yet been implemented, and Commission proceedings in the case have been stayed on the motion of PMA and ILWU pending conclusion of judicial review (App. 222-223). Issues remaining before the Commission are whether the Agreement should be approved, if Section 15 covers it; whether it violates Section 16 or 17; and whether it is exempt from either Section 16 or 17 by reason of national labor policy (App. 12-13, 23, 195-196).

The National Labor Relations Board has since found the CFSS to be an illegal "hot cargo clause" in violation of 29 U.S.C. 158(e). International Longshoremen's and Warehousemen's Union (California Cartage Co.), 208 NLRB 994, enforced without opinion sub nom. International Longshoremen's and Warehousemen's Association v. National Labor Relations Board, 515 F. 2d 1017 (C.A.D.C.), and Pacific Maritime Association v. National Labor Relations Board, 515 F. 2d 1018 (C.A.D.C.).

items 7, 8, or 9 is ground to deny the work force to the nonmember.

The agreement contains a severability clause. It also provides that it will continue until terminated on such terms and conditions as may be "mutually agreed to" by the PMA, the ILWU and the participant.

The ports in their complaint to the Commission <sup>18</sup> contend that if they sign the agreement, their competitive position will be hurt because they will have to forego favorable local labor contract provisions, with resultant higher costs to port users, <sup>16</sup> and will re-

linquish to PMA the right to set their labor standards; and that if they do not sign the agreement, they will be prohibited from using the joint work force. They contend that, as a source for skilled workers, there is no substitute for the joint work force, and that without these skilled workers the ports could not operate and would have to close. Further, even with respect to less skilled dockworkers, the ports state they have relied entirely on the ILWU hiring halls and have no developed source of such workers on which they could rely (App. 220).

The ports contend that they could not obtain non-ILWU labor, since if non-ILWU longshore workers were hired, other ILWU workers at the port would refuse to work on the cargo the non-ILWU workers had handled (App. 53, 60, 220-221), thereby effectively closing the ports (*ibid.*). Picketing could also be expected adversely to affect port operations (A.P. 70a-71a). The ports argue that the union's claim that the ports are not hurt by the agreement because they have "the right to negotiate their own separate work force with other unions including the ILWU" (App. 208), is an empty one, since no such alterna-

<sup>15</sup> The ports brought suit in the United States District Court for the District of Oregon alleging that the Nonmember Participation Agreement violated the antitrust laws. See App. 128-131. The Port of Longview brought a separate suit on the same theory (*ibid.*). Both cases have been stayed pending disposition of this case. The Port of Seattle also brought suit alleging, among other things, that attempts to exclude nonmembers from use of the joint work force violated the antitrust laws (see App. 163-178); the parties have dismissed this suit.

<sup>&</sup>lt;sup>16</sup> For example, the Port of Anacortes may call out workers on a minimum four-hour basis to load one or two trucks; if this were eliminated as a deviant provision, the port would have additional labor costs (App. 51).

The Port of Grays Harbor has a variant contract permitting longshoremen to work in a repair shop; increasing the non-overtime day from six to eight hours; and permitting skilled workers to be shifted among several skilled jobs (App. 55).

The Ports of Olympia and Port Angeles, under the PMA-ILWU Agreement, would be required to import checkers from Seattle rather than using local ILWU employees, with attendant additional travel expense and travel pay (App. 56-57).

<sup>&</sup>lt;sup>17</sup> The Port of Portland lists straddle carrier drivers, lift truck drivers, Wagner log handler drivers and container, whirley and bridge crane operators as skilled longshoremen available only from the ILWU (App. 186). The ports have contributed to the training of these men (App. 187).

<sup>&</sup>lt;sup>18</sup> The ports point to the multi-million dollar investments they have made in facilities and the substantial revenue losses to their communities if they closed (App. 50, 51-61).

tive work force exists, or could be used even if it did exist (App. 221).10

## B. THE COMMISSION DECISION

After considering affidavits and memoranda submitted by the parties, the Commission held that it had jurisdiction over the Revised Agreement under Section 15 of the Shipping Act, 1916." It determined that since ocean common carriers and terminal operators, as members of PMA, were parties to the agreement, it constituted an agreement among "person[s] subject to the Shipping Act," despite the participation of persons not subject to the Act such as the ILWU (A.P. 52a-54a). Further, since the admitted purpose

of the agreement was to place PMA members and nonmembers on an equal competitive basis, it was an "agreement \* \* controlling [or] regulating \* \* competition." Thus, the Commission concluded that the agreement came within the filing and approval requirements of Section 15 unless it was entitled to a labor exemption analogous to that recognized under the antitrust laws (A.P. 55a-56a).

In determining whether the agreement was subject to a labor exemption, the Commission applied the guidelines it had developed in *United Stevedoring Corp.* v. Boston Shipping Association, 16 FMC 7, for accommodating Shipping Act policies with labor policy where collective bargaining agreements are at issue. The Commission had derived these criteria from the case law defining the exemption from the antitrust laws for collective bargaining agreements, where the agreement has anticompetitive effects and the legitimate labor interest is weak or nonexistent. See e.g., United Mine Workers v. Pennington, 381 U.S. 657; Meat Cutters v. Jewel Tea, 381 U.S. 676; Allen Bradley Co. v. Local No. 3, 325 U.S. 797.

The Commission found that the PMA-ILWU agreement failed to meet the Boston Shipping guidelines for exemption from the Shipping Act, 1916, in two

<sup>&</sup>lt;sup>10</sup> The ports also considered unacceptable the possibility of not signing the agreement and contracting with PMA steve-doring companies. The ports then could no longer inform the stevedores that the port is considering the option of doing the work itself; the expected result would be higher prices and reduced services (App. 59). The ports were also concerned that the stevedoring companies would attempt to divert cargo to other ports where the companies could operate more conveniently and economically (App. 52).

The Commission rejected a suggestion by its Hearing Counsel that, even if it had jurisdiction, it should defer to the the National Labor Relations Board or the courts as bodies with greater expertise in labor and antitrust matters. It considered deferral to the Board inappropriate because the case concerned an allegedly anticompetitive agreement between union and employer, not a failure of the collective bargaining process (A.P. 49a-51a). It found the agreement "so intricately involved with its responsibilities under the shipping statutes" that deferral to the court in the pending antitrust cases would be inappropriate (A.P. 51a-52a).

erally that the extent of the possible effect of an agreement on competition would have to be weighed against the effect of Commission sanctions on the collective bargaining process, and it announced guidelines for making that determination. See pp. 37-38, infra.

respects. First, the agreement did not relate to a mandatory bargaining subject, since it was not directed at the hours and working conditions of PMA employees as such, but rather at the labor policies of nonmembers (A.P. 61a-62a). Second, since the agreement was specifically designed to compel nonmember entities to observe PMA labor policies under threat of exclusion from the ILWU work force, it imposed terms on persons outside the bargaining unit (A.P. 62a-63a). The Commission stated that the agreement, by regulating the conduct of third parties, bore a "striking resemblance" to the agreement held not exempt from the antitrust laws in *United Mine Workers* v. *Pennington*, supra (A.P. 66a).

The Commission concluded (A.P. 72a):

weighing the various Shipping Act and labor interests raised by the Revised Agreement, we conclude \* \* \* that the many and potentially severe shipping problems raised by the Revised Agreement balanced against the minimal impact our regulation thereof would have on the collective bargaining process [22] fully warrants our denial of a "labor exemption" in this proceeding.[23]

The Commission ordered the case set for hearing on the merits (A.P. 76a-77a).

### C. THE COURT OF APPEALS DECISION

On appeal by PMA and the ILWU, the Court of Appeals for the District of Columbia Circuit held that the Commission has no Section 15 jurisdiction over the Revised Agreement. It concluded that the statutory requirement for prior Commission approval of agreements would pose an intolerable barrier to prompt implementation of collective bargaining agreements and maintenance of industrial peace in the shipping industry, and that Section 15 therefore is inapplicable to all collective bargaining agreements (A.P. 28a-29a). The court rejected temporary Commission approval of agreements as a solution, since this did not remove the "resultant specter of a final agreement \* \* \* [being] upset by [later] partial invalidation \* \* \*" (A.P. 30a).

The court concluded that exempting collective bargaining agreements "as a class" from Section 15 is the best method to reconcile labor and shipping objectives (A.P. 35a). It recognized that its holding precluded for collective bargaining agreements the antitrust immunity that Section 15 approval provides, even in cases in which shipping considerations would support an exemption (A.P. 41a). The court stated

<sup>22</sup> The Commission stated (A.P. 71a):

<sup>[</sup>W]e find that the Revised Agreement has little if any effect on the collective bargaining process. With or without the Revised Agreement, the provisions for fringe benefits, which are the main concern of the ILWU, remain unchanged.

<sup>&</sup>lt;sup>23</sup> Commissioner Morse dissented, arguing that, in light of the labor policies involved, the Commission in its discretion should defer to the National Labor Relations Board and the

courts. If the courts upheld the agreement, he would then have exercised Commission jurisdiction to determine whether any practices under it violated Section 16 or 17 of the Shipping Act (A.P. 73a-75a).

that Sections 16 and 17 of the Act <sup>34</sup> and the antitrust laws provide adequate remedies for dealing with the anti-competitive consequences of collective bargaining agreements in the shipping industry, while avoiding the delay in establishing industrial peace that requiring prior Commission approval of such agreements would cause. (A.P. 38a-40a).

As an alternative ground of decision, the court stated that, even under a balancing test weighing Shipping Act and labor relations considerations, the agreement would be exempt from filing (A.P. 35a). It concluded that the ports' argument "boils down to an accusation that they are being forced against their wills into a multi-employer unit" and that Section 15 "was [not] intended to cover problems so clearly within the realm of National Labor Relations Board expertise" (A.P. 37a).

### SUMMARY OF ARGUMENT

I

A. 1. Section 15 of the Shipping Act, 1916, requires persons covered by the Act to file with the Federal Maritime Commission "every agreement \* \* controlling, regulating, preventing, or destroying competition." The Commission must disapprove agreements that violate the standards provided in Section 15. It is illegal to carry out an agreement that the

Commission has not approved or has disapproved. Agreements the Commission has approved are exempt from the antitrust laws.

Nothing in the broad language of Section 15 or its legislative history suggests that collective bargaining agreements as a class are exempt from its requirements. To the contrary, this Court's ruling in Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 277, that the Commission improperly had exempted from the Act a category of agreements that was neither "de minimis nor routine," indicates that collective bargaining agreements likewise are not exempt as a class. Although the Act authorizes the Commission to exempt from its requirements "any class of agreements" (Section 35, 46 U.S.C. 833a), the agency has not exempted collective bargaining agreements.

2. In administering the Shipping Act, the Commission is required to consider antitrust policies. One aspect of those policies is the recognition that certain aspects of collective bargaining agreements are exempt from the antitrust laws. The Commission properly has concluded that there is a labor exemption under Section 15 comparable to that under the antitrust laws. The exemption is not a blanket one, however, but, like the antitrust exemption, involves a balancing of interests: here, labor and Shipping Act interests.

It is through this labor exemption to the Shipping Act that national labor policy is recognized in the administration of that Act. That policy does not

<sup>&</sup>lt;sup>24</sup> The court stated that a labor exemption analogous to the labor exemption from the antitrust laws could properly be applied under Sections 16 and 17 (A.P. 40a). That question is pending before the Commission (A.P. 72a).

require a blanket exemption of all collective bargaining agreements from the scrutiny of the Commission, regardless of how seriously adverse their effects upon

competition may be.

B. The court of appeals seriously exaggerated the effect that the requirement in Section 15 of prior filing with and approval by the Commission of collective bargaining agreements would have upon collective bargaining. There are no empirical data supporting the court's conclusion that obtaining advance Commission approval of anticompetitive provisions of those agreements would interfere with the bargaining process. To the contrary, by removing the uncertainty about the legality of some provisions, Commission approval would appear likely to aid rather than handicap the reaching of agreement and the maintenance of industrial peace.

Under the Commission's guidelines, most routine collective bargaining provisions would not require filing with the Commission. Moreover, if there is serious question concerning the applicability of Section 15 to particular provisions, the Commission normally will give interim conditional approval, and may issue a declaratory order.

II

A. In holding that the Revised Agreement does not have a labor exemption under Section 15, the Commission properly applied its balancing test. It found, and the record supports the findings, that the Revised Agreement failed to meet two of the guidelines the Commission uses in applying the balancing test:

(1) Since the primary purpose of the agreement was to place pressure on nonmembers of PMA to join that organization, the agreement did not involve a mandatory subject of bargaining because any effect it had on labor relations between the union and PMA members was minimal. (2) The agreement endeavored to impose terms and conditions on persons outside the bargaining unit, namely, upon nonmembers of PMA. In this respect, the agreement closely resembles the agreement held not to be exempt from the antitrust laws in *United Mine Workers* v. *Pennington*, 381 U.S. 657.

The Commission correctly concluded that the agreement does not merit a labor exemption. It ruled that although the agreement would have little effect upon labor relations—the agreement would not affect fringe benefits, which are the union's main concern—it would have potentially seriously adverse effects upon Shipping Act interests, since it could result in shutting down the ports that are not members of PMA.

B. As an alternative ground for decision, the court of appeals stated that even under a balancing test, the agreement is entitled to a labor exemption. The court exceeded the proper scope of judicial review by itself undertaking the weighing of the competing Shipping Act and labor interests, a task that is primarily for the Commission to perform. The Commission's balancing of the competing interests reflects its knowledge of the shipping industry, and the court of appeals should have given greater deference to the agency's expert judgment.

The fact that some provisions of the Revised Agreement may raise questions under the National Labor Relations Act does not vitiate the Commission's conclusion that the agreement is not entitled to a labor exemption. As this Court has recognized, collective bargaining agreements may raise problems under both the Labor Act and other regulatory statutes; the National Labor Relations Board and the other regulatory agency each may consider the issues within its own jurisdiction. Similarly, the Commission was not required to stay its hand because the issues before it under the Shipping Act were also the subject of pending antitrust suits. Normally, the court defers to the agency, not the agency to the court. Here the case for the Commission acting first is particularly compelling, since if it approves the agreement under Section 15, the agreement will obtain antitrust immunity, and the antitrust suits will terminate.

### ARGUMENT

T.

COLLECTIVE BARGAINING AGREEMENTS AS A CLASS ARE NOT EXEMPT FROM SECTION 15 OF THE SHIPPING ACT, 1916

A. Section 15 covers collective bargaining agreements.

Section 15 of the Shipping Act, 1916, requires persons covered by that Act to file with the Federal Maritime Commission "every agreement \* \* controlling, regulating, preventing or destroying competition" (A.P. 80a). The Commission is required to disapprove any agreement that it "finds to be unjustly dis-

exporters, importers, or ports, \* \* \* or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations" (id. at 81a). It is illegal to carry out any agreement subject to Section 15 unless the Commission has approved it or if the Commission has disapproved it (id. at 82a). Agreements the Commission has approved are exempt from the antitrust laws (id. at 82a).

Nothing in this broad language even suggests that because an agreement "controlling, regulating, presenting or destroying competition" is a product of collective bargaining, it is exempt from the requirements of Section 15.

Although Section 15 covers "every" agreement, the Commission may "determine, after appropriate administrative proceedings, that some types or classes of agreements coming within the literal provisions of § 15 are of such a de minimis or routine character as not to require formal filing" (Volkswagenwerk, supra, 390 U.S. at 276). Indeed, Congress has expressly authorized the Commission to except from the Act "any class of agreements \* \* \* where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce" (Section 35, 46 U.S.C. 833a).

Nothing in Section 15 or its legislative history, however, indicates that Congress intended to exempt from Commission scrutiny all collective bargaining agreements that control, regulate, prevent or destroy competition. The existence of that specific exemptive authority strongly suggests that Congress intended to leave it to the discretion of the agency to determine what categories of anti-competitive agreements should be excepted from Section 15. The Commission has not exempted this class of agreements from Section 15.

In Volkswagenwerk, supra, this Court rejected an attempt by the Commission itself to exempt a significant type of agreement from Section 15. There the Commission had held that that section did not cover an agreement among PMA members establishing the formula by which the costs of a fund to mitigate the impact of technological unemployment upon maritime

employees, established by a collective bargaining agreement between PMA and ILWU, were to be allocated among some of those members. The Commission's theory was that although the assessment formula for the fund "was a 'cooperative working agreement' clearly within the plain language of § 15," the statute governs only agreements that "affect \* \* competition" in the sense that "there was an additional agreement by the [Association] membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators" (390 U.S. at 271-272).

This Court held that since the agreement "was neither de minimis nor routine \* \* \* [it] was required to be filed under § 15 of the Act" (id. at 277). It pointed out that the "statute \* \* \* uses expansive language" (id. at 273) and that "[t]o limit § 15 to agreements that 'affect competition,' as the Commission used that phrase in the present case, simply does not square with the structure of the statute" (id. at 275, footnote omitted). The Court stated that "[n]othing in the legislative history suggests that Congress, in enacting § 15 of the Act, meant to do less than \* \* \* subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry" (id. at 276, footnote omitted).

The Court in Volkswagenwerk rejected the Commission's attempt itself to exempt from Section 15 a significant category of agreements. Here the Commission refused to create an exemption for a similarly broad group of agreements, but the court of

<sup>25</sup> The legislative history of the Shipping Act is unilluminating concerning Congress' specific intent where a labor union is a signatory to an agreement otherwise subject to the Act (see A.P. 34a). Since port-wide labor organizations had been formed in Seattle and New York only in 1915 and 1916, respectively (see A.P. 34a, n. 32), the problem of the effect of anti-competitive provisions of collective bargaining agreements in the shipping industry was not then serious and Congress understandably did not consider it. The Act was broadly designed, however, to provide for the "regulation of \* \* \* such \* \* \* conditions of water transportation as affect the interests of shippers" (H.R. Doc. No. 805, 63d Cong., 2d Sess. 419 (1914)). Nothing in the legislative history indicates that Congress intended to exclude from the requirement in Section 15 of Commission scrutiny of anti-competitive agreements, those agreements that were reached through collective bargaining.

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appeals provided such an exemption. In so doing, the Court impermissibly trenched upon an area Congress assigned primarily to the Commission.

Volkswagenwerk did not directly involve the basic collective bargaining agreement between PMA and ILWU, but only the subsequent agreement, which the collective bargaining agreement contemplated, by which the employers specified the procedure for raising the fund that the collective bargaining agreement created. Indeed, the Court stressed (390 U.S. at 278) that the "only agreement involved in this case is the one among members of the Association"; that "[n]o claim has been made in this case" that "the collective bargaining agreement between the Association and the ILWU \* \* \* was subject to the filing requirements of § 15"; and that nothing in its opinion "is to be understood as questioning \* \* \* [the] continuing validity [of that agreement]."

But the basic rationale of Volkswagenwerk—that there is no basis in the statute for reading into Section 15 an exemption for anti-competitive agreements that are "neither de minimis nor routine" (390 U.S. at 277)—is inconsistent with the view that all collective bargaining agreements are exempt from Section 15, or that an anti-competitive provision is exempt because it appears in such an agreement. Cf. New York Shipping Association, Inc. v. Federal Maritime Commission, 495 F.2d 1215, 1220-1221 (C.A. 2), certiorari denied, 419 U.S. 964. The question whether that section applies depends not upon the subject matter of, or the participation of third parties, such as

unions, in the agreement, but upon the agreement's purpose and effect: whether it is an agreement "controlling, regulating, preventing, or destroying competition."

- B. National labor policy does not require or justify a blanket exemption from Section 15 for collective bargaining agreements.
- 1. The court of appeals concluded, however, that "agreements between labor and management, while subject to antitrust and shipping legislation, cannot be fitted into the pre-implementation approval procedures of Section 15 without ignoring the national policy fostering industrial peace through collective bargaining" (A.P. 42a). It stated that "the priorrestraint procedures of section 15 impose such an extraordinary burden on collective bargaining that the dividing line must be drawn between labor-related agreements among employers, which are subject to section 15, and direct agreements negotiated between union and management, which we hold to be outside the scope of that section" (id. at 2a). In its view "[t]he nature of collective bargaining as it exists in this country today requires the ability of both sides to implement promptly the compromise agreements worked out in eleventh-hour bargaining sessions or, as in this case, in hard-fought negotiations following a strike and mediation" (id. at 28a-29a). "Subjecting negotiated labor agreements to filing and approval (or disapproval or modification) \* \* \* would make nearly impossible the maintenance or prompt restoration of industrial peace \* \* \*" (id. at 28a).

As explained in Point II A, pp. 32-37, infra, in administering the Shipping Act the Commission is required to take account of the policies of the antitrust laws. As part of that process, the agency properly recognizes a labor exemption from the Shipping Act comparable to the labor exemption from the antitrust laws. It is through the recognition of that exemption, however, that national labor policy is reflected in the administration of the Shipping Act. National labor policy does not call for a blanket exemption of all collective bargaining agreements from Section 15, without regard to the impact of the restraints in a particular agreement upon competition and the comparative significance of those restraints for valid Shipping Act and labor interests.

 The court of appeals exaggerated the impact that prior Commission approval of collective bargaining agreements would have upon the collective bargaining process and the maintenance and restoration of industrial peace.

Under the Commission's standards for determining whether a particular collective bargaining agreement has a labor exemption, most routine agreements covering wages, prices and working conditions would not be subject to the filing requirement of Section 15 (see Point II B, infra). Providing an exemption for all collective bargaining agreements, however, would preclude the Commission from applying the standards of Section 15 to major agreements whose impact goes far beyond traditional labor relations matters and which implicate important Shipping Act and anti-

trust issues. For example, such an exemption would insulate from Commission scrutiny agreements covering restrictive practices in a major port, as in the New York Shipping Association case, supra, or on the entire West Coast, as in the present case.

The court of appeals' conclusion that the delay in implementing a collective bargaining agreement while Commission approval is obtained would be harmful to the collective bargaining process, does not rest upon empirical data, but is largely conjecture. It does not provide an adequate basis for creating a broad exemption from Section 15 for all collective bargaining agreements.

Moreover, it is far from clear that the delay in implementing such agreements would impede collective bargaining, in circumstances where the effect of such advance approval is to protect against invalidation of the agreement under the Shipping Act or the antitrust laws. In many situations the parties to collective bargaining agreements—particularly where the legality of some provisions may be open to question under those laws—may be better off if such legality is determined before the agreement is implemented. Such approval would avoid the inevitably disruptive effect when an operative collective bargaining agreement is invalidated. As Mr. Justice Harlan stated in his concurring opinion in Volkswagenwerk (390 U.S. at 285-286):

\* \* \* I would find it very difficult to see why provision for advance approval and [antitrust] exemption of labor-related agreements would not be preferable, from the standpoint of facilitating collective bargaining, to the "wait and see" approach.26

Finally, the parties to collective bargaining may seek from the Commission temporary, i.e., conditional, approval of an agreement before it is implemented or finally approved. For example, in 1970 the Commission gave conditional approval to an agreement involving labor arrangements between a shipping association and a union in the Port of New York (Agreement Relative to the New York Shipping Association Cooperative Working Arrangement, FMC Docket No. 69-57, March 11, 1970). It stated:

Our past experience leads us to the view that should the [New York Shipping] Association default in its payment to the ILA [International Longshoremen's Association], a labor crisis would result at the Port of New York. That such a crisis would be adverse to the public interest and work to the detriment of our foreign commerce is, we think, beyond dispute. \* \* \* We firmly believe that considerations of public interest require that we conditionally approve Agreement T-2390 now.

Moreover, the Commission will issue a declaratory order about the validity of or need to file a particular agreement if necessary to "remove uncertainty" or "terminate a controversy." See 46 C.F.R. 502.68. That was the procedure the parties to the agreement selected in the New York Shipping Association case, supra, where they sought from the Commission "an order declaring that the assessment agreement was not subject to the filing or approval requirements of § 15 of the Shipping Act" (495 F.2d at 1218).

The blanket immunity from Section 15 that the court of appeals has created for collective bargaining agreements would produce undesirable and anomalous results. For example, agreements that might otherwise violate the antitrust laws but that the Commission would approve under Section 15 because they would further the policy of the Shipping Act or provide important public benefits, would be denied the antitrust immunity that Commission approval confers. Conversely, agreements that would violate Section 15 if a union were not a party, but not violate

<sup>28</sup> The court of appeals stated (A.P. 31a-32a) that because (1) there are substantial penalties for violation of the Shipping Act and (2) the Commission applies "rule-of-thumb" guidelines in determining on a case-by-case basis whether particular collective bargaining agreements have a labor exemption, employers would be likely to file "all agreements with potential anticompetitive results, thus further disrupting the course of negotiations." As previously indicated, however, the labor exemption covers the bulk of routine collective bargaining provisions. Moreover, an employer's possible difficulty in determining whether a particular collective bargaining agreement must be filed under Section 15 is unlikely to be any greater than that involved in many of the other determinations it must make in deciding whether to file other agreements, such as those conferring "special advantages" or "in any manner" providing for "exclusive, preferential or cooperative working arrangement" (A.P. 80a).

Section 16 or 17 \*\* or the antitrust laws, would be permitted to become effective.\*\*

#### II.

THE FEDERAL MARITIME COMMISSION PROP-ERLY CONCLUDED THAT THE REVISED NON-MEMBER PARTICIPATION AGREEMENT DOES NOT MERIT A LABOR EXEMPTION

A. Collective bargaining agreements have an implied exemption from Section 15 similar to the labor exemption from the antitrust laws.

In the Shipping Act, 1916, Congress placed under government supervision the conference system by which steamship lines fixed prices and otherwise suppressed competition, and gave an administrative agency the authority to approve or disapprove anticompetitive agreements in the shipping industry. See Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 736-738. Congress established standards governing approval or disapproval, and exempted from the antitrust laws agreements the agency approved. In 1961 these standards were revised to provide for Commission disapproval of agreements that are "contrary to the public interest" (see Federal Maritime Commission v. Svenska Amerika Linien, 390 U.S. 238, 243).

The public interest standard in Section 15 "requir[es] the Commission to consider the antitrust implications of an agreement before approving it" (Federal Maritime Commission v. Seatrain Lines, Inc., supra, 411 U.S. at 739). Although the Commission may approve agreements "even though they are violative of the antitrust laws \* \* \* [it] must take antitrust principles into account in reaching its decision" (id. at 728). The Commission may disapprove an agreement because of its inconsistency "[with] antitrust policy" (Federal Maritime Commission v. Svenska Amerika Linien, supra, 390 U.S. at 243). The Commission follows the principle that "conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can 'bring forth such facts as would demonstrate that the \* \* \* rule was required by a serious transportation need, necessary to secure important public bene-

<sup>&</sup>lt;sup>27</sup> Section 16 prohibits the giving of an "undue or unreasonable preference or advantage." Section 17 makes unlawful rates, fares, or charges that are "unjustly discriminatory between shippers or ports or unjustly prejudicial to exporters of the United States as compared with their foreign competitors"; and requires persons subject to the Act to observe just and reasonable regulations and practices relating to the receiving, handling, storing or delivering of property. Agreements that do not violate these specific prohibitions nevertheless may violate the broader provisions in Section 15 against agreements that "operate to the detriment of the commerce of the United States" or are "contrary to the public interest."

<sup>&</sup>quot;plac[ing] collective bargaining units in the shipping industry under more stringent federal regulation than other transportation industries," the former would be "at a competitive disadvantage." That conclusion rests on the same premise as the court's theory that requiring advance approval will impede collective bargaining, and it is subject to the same flaws. Moreover, since the shipping industry already is required to obtain advance Commission approval of a large number of agreements, it is difficult to see why also requiring such approval of a relatively small number of additional agreements resulting from collective bargaining would adversely effect its competitive position against other transportation industries.

fits or in furtherance of a valid regulatory purpose of the Shipping Act, See [10] F.M.C., at [27, 45]." (Federal Maritime Commission v. Svenska Amerika Linien, 390 U.S. 238, 243). This Court has "construe[d] the Shipping Act as conferring only a 'limited 'antitrust exception' in light of the fact that 'antitrust laws represent a fundamental national economic policy.'" (Federal Maritime Commission v. Seatrain Lines, Inc., supra, 411 U.S. at 733).

One aspect of the "fundamental national economic policy" that the antitrust laws represent is that certain aspects of collective bargaining agreements are exempt from the application of the antitrust laws. This principle had its origin in Sections 6 and 20 of the Clayton Act, 38 Stat. 731, 738, 15 U.S.C. 17, 29 U.S.C. 52, as supplemented by Sections 4, 5, and 13 of the Norris-LaGuardia Act, 47 Stat. 71, 73, 29 U.S.C. 104, 105 and 113. See Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621. "The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions" (id. at 622).

The Court explained the rationale of this nonstatutory exemption as follows (id. at 622-623):

The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. See Mine Workers v. Pennington, supra, at 666; Jewel Tea, supra, at 692-693 (opinion of White, J.). Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, e.g., Federation of Musicians v. Carroll, 391 U.S. 99 (1968), the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market.

In considering the policies reflected in the antitrust laws in applying Section 15, the Commission properly concluded that it should recognize a labor exemption comparable to that long recognized under the antitrust laws themselves. As the Commission stated in its decision recognizing that exemption (United Stevedoring Corp. v. Boston Shipping Association, 16 FMC 7, 11):

The "labor exemption" originated in the area of accommodation of the labor laws and the anti-trust laws. To preclude the application of the antitrust laws to various collective bargaining agreements entered into between labor and man-

agement, the courts carved out of the antitrust laws a "labor exemption", by means of which such agreements were held to be immune from attack under antitrust laws. Thus, the analogy to a "labor exemption" from the shipping laws is obvious.

The Commission pointed out (id. at 13):

Since maritime employers are permitted to bargain as a group, and since they are required to bargain about certain subjects (the mandatory subjects of collective bargaining), the resulting agreements must have some exemption from the requirements of section 15.

It would be anomalous if the Commission, although required to consider the antitrust laws and policies in applying Section 15, could not also take account of the exemption from those standards that exist for certain restrictive provisions in collective bargaining agreements. This is particularly so because in the Shipping Act Congress, to a considerable degree (cf. Federal Maritime Commission v. Seatrain Lines, Inc., supra), has substituted the standards and procedures of that Act for the antitrust laws as the method of regulating competition in the shipping industry. The reasons that require an accommodation of shipping and antitrust interests also require recognition of the fundamental national policy that certain aspects of labor-management relations are not subject to the antitrust laws. As Mr. Justice Harlan stated in his concurring opinion in Volkswagenwerk (390 U.S. at 287):

Since maritime employers are permitted to bargain as a group, and since they are required to bargain about certain subjects, the resulting agreements must have some exemption from the filing requirements of § 15 and from successful challenge under the antitrust laws or under the substantive principles in §§ 16 and 17 of the Shipping Act.

B. In determining whether a particular collective bargaining agreement has a labor exemption, the Commission properly reconciles Shipping Act and labor interests by weighing and balancing the comparative impacts upon those interests of applying Section 15 to the agreement.

In Boston Shipping Association, supra, the Commission properly "adopt[ed] for purposes of assisting us in determining the labor exemption from the shipping laws" the criteria this Court has developed "for determining the labor exemption from the antitrust laws" (16 FMC at 12). The Commission stated that although it would resolve "each case on an ad hoc basis," the following criteria, none of which was itself "controlling," would provide "[objective] guidelines or 'rules of thumb' for each factual situation" (id. at 12-13):

1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball".

2. The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union

concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

3. The result of the collective bargaining does not impose terms on entities outside of the col-

lective bargaining group.

4. The union is not acting at the behest of or in combination with nonlabor groups, *i.e.*, there is no conspiracy with management.

The Commission further stated (id. at 13):

In the final analysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement. In balancing the equities, the above criteria will no doubt be of value.

The Commission's guidelines for determining the labor exemption under the Shipping Act fairly reflect the standards this Court has developed for the labor exemption under the antitrust laws. Cf. Apex Hosiery Co. v. Leader, 310 U.S. 469; United States v. Hutcheson, 312 U.S. 219; Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797; United Mine Workers v. Pen-

nington, 381 U.S. 657; Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, supra. As the Court explained in Pennington (381 U.S. at 664-665, 666, 668):

\* \* \* [A] union may conclude a wage agreement [for] the multi-employer bargaining unit without violating the antitrust laws \* \* \*.

This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form or content of the agreement. \* \* \*

- \* \* \* [A] union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units.
- \* \* \* [T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions in other bargaining units or to attempt to settle these matters for the entire industry. \* \* \*

On the other hand, the policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit.

Cf. Meat Cutters v. Jewel Tea, 381 U.S. 676, 689-690 (opinion of Mr. Justice White).

As the foregoing decisions of this Court show, the determination whether particular restraints in a col-

lective bargaining agreement are covered by the labor exemption from antitrust laws requires a balancing of the effect of those restraints upon labor interests on the one hand and competition on the other hand. The Commission acted within its authority in adopting a similar method for determining the scope of the labor exemption to the Shipping Act.

Under both statutes there is a preliminary determination whether the challenged agreement or conduct qualifies for the labor exemption. If it does, that is the end of the inquiry, and the case is over. If it does not qualify, there is the further determination of violation. Under the Shipping Act, that determination also involves a balancing process: the anti-competitive effects of the restraints must be weighed against the Shipping Act interests that the restraints serve. In making the preliminary determination whether the labor exemption covers particular restraints, the Commission properly weighs the comparative impact upon Shipping Act and labor interests of subjecting the agreement to Section 15.

C. The Commission correctly concluded that under the balancing test the Revised Nonmember Participation Agreement does not have a labor exemption.

The court of appeals ruled (A.P. 35a) that "[e]ven if we were to adopt the balancing test suggested by Justice Harlan [in Volkswagenwerk], the agreement at issue would be exempt from filing." The court viewed the issue in the case under a balancing test as whether nonmembers of PMA "are being forced against their will into a multi-employer unit [PMA]," and concluded that "the Shipping Act pre-implemen-

tation approval provision was [not] intended to cover problems so clearly within the realm of National Labor Relations Board expertise" (A.P. 37a).

In thus itself undertaking to balance the competing interests, the court exceeded the proper scope of judicial review. If, as we believe, the Commission may use the balancing test for determining whether a particular agreement has a labor exemption, the role of the reviewing court necessarily is limited. Its function is to determine whether, in striking the balance as it did in this case against a labor exemption, the Commission abused its discretion. As we now show, the Commission's decision in this case, reflecting as it did "the Commission's special familiarity with the shipping industry, is fully within the competence of this administrative agency and should be respected by the reviewing courts." (Federal Maritime Commission v. Svenska Amerika Linien, supra, 390 U.S. at 249; cf. New York Shipping Association, Inc., supra, 495 F.2d at 1221-1222.)

1. The Commission properly concluded (A.P. 55a-56a) that the Revised Agreement was one "controlling, regulating, preventing, or destroying competition," which under Section 15 must be filed for agency approval unless it has a labor exemption. As the

Section 15 gives the Commission jurisdiction over agreements among "common carrier[s] by water" and "other

<sup>&</sup>lt;sup>39</sup> PMA, ILWU and the Council of North Atlantic Shipping Associations argued before the Commission that the agency had no jurisdiction over the agreement because some members of PMA are not subject to Commission jurisdiction. The Commission properly rejected this contention.

Commission pointed out (A.P. 55a-56a, footnote omitted), "PMA itself readily admits that the purpose of the supplemental agreement is to \* \* \* place nonmembers on the same 'competitive' basis as members of the PMA.\* In short, the effect of the Revised Agreement

person[s] subject to the Act" (A.P. 80a). "Other person[s] subject to the Act" is defined to mean any person, not a common carrier by water, in "the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" (Section 1, 46 U.S.C. 801). Some of the members of PMA, such as the stevedoring companies, as well as the ILWU, are not "other person[s]" under this definition.

The Commission consistently has held that it has jurisdiction over an association which includes members who are common carriers by water or "other persons," even though other members are not in that category. See Boston Shipping Association, supra, 16 FMC at 9-10; New York Shipping Association, 16 FMC 381. In upholding the Commission's jurisdiction in the latter case, the court of appeals for the Second Circuit stated (New York Shipping Association, supra, 495 F. 2d at 1220):

The assessment agreement fits the definition of § 15 since it imposes obligations on common carriers by water and other persons subject to the Shipping Act, to wit, terminal operators, see 46 U.S.C. § 801. An agreement to which such persons are parties is not taken out of § 15 by the fact that persons not fitting that definition, to wit, stevedoring contractors who are not terminal operators, are also bound. Volkswagenwerk established that an agreement among water carriers, stevedoring contractors and terminal operators allocating assessments for benefits negotiated with a longshoremen's union requires approval under § 15.

<sup>30</sup> See also the statements by PMA officials at App. 89-90, 95-98, 102.

is to control or affect competition between members and nonmembers." \*1

2. In denying a labor exemption, the Commission stated (A.P. 69a-70a, footnote omitted):

In the "final analysis", our assertion of jurisdiction over a labor-related agreement requires, as we noted in Boston Shipping, a consideration of the impact of such agreement on the competitive conditions in the industry, vis-a-vis its impact on the collective bargaining process. On this basis, and taking into consideration several past court decisions involving labor-related agreements, we find that while the Revised Agreement has a minimal effect on the collective bargaining process, it has such a potentially severe and adverse effect upon competition under the Shipping Act as would justify our consideration of its approvability under the standards thereof.

It noted that the ports' "failure to sign the Revised Agreement" could have a seriously adverse impact

<sup>81</sup> The Commission noted, as an example of the effects of the agreement on competition, its provision requiring nonmembers to honor PMA lockouts, thus preventing nonmembers from continuing operations while members' facilities are shut down (A.P. 56a, n. 8).

The Commission's conclusion that the agreement controls competition is in accord with decisions condemning, as violations of the Sherman Act, concerted action that places onerous conditions on the use of a unique resource necessary to do business. See Associated Press v. United States, 326 U.S. 1; Silver v. New York Stock Exchange, 373 U.S. 341, 347-349; United States v. Terminal Railroad Association of St. Louis, 224 U.S. 383, 409-411.

The Court has previously approved the application of Sherman Act principles to invalidate a similar agreement under the

upon "their ability to compete with PMA members," because it "could well result in the closing of their facilities and the cessation of [their] operations" (A.P. 70a). "On the other hand, we find that the Revised Agreement has little if any effect on the collective bargaining process. With or without the Revised Agreement, the provisions for fringe benefits, which are the main concern of the ILWU, remain unchanged" (A.P. 71a)."

In thus weighing and balancing the competing interests, the Commission utilized the guidelines it announced in Boston Shipping (supra, pp. 37-38). It found it unnecessary to consider two of the four criteria—whether the agreement was the product of good faith, arms-length bargaining, and whether there was a conspiracy between PMA and ILWU—because it concluded that the agreement ran afoul of the two other criteria (A.P. 59a, 69a).

The Commission ruled (a) that since the "primary purpose of the Revised Agreement is to bring nonmembers into the PMA 'camp,'" its effect upon the hours or working conditions of ILWU employees of PMA members is "incidental" to that "main purpose"; the subject of the agreement, therefore, "is not a mandatory subject of bargaining" (A.P. 62a); and (b) that since "the Agreement is specifically designed to compel nonmember entities to join PMA under threat of exclusion from the ILWU work force \* \* \* it clearly imposes terms and conditions upon persons outside the bargaining unit" (A.P. 62a-63a). We now show that the record supports both of these conclusions. As the Commission pointed out (A.P. 58a, 62a), they are alternative grounds for considering the withholding of a labor exemption.

(a) The Commission stated that although an agreement deals with wages, hours, or working conditions, it does not relate to a mandatory subject of bargaining if it is not "directed to the labor relations of the contracting employer vis-a-vis his own employees" (A.P. 61a-62a). In defining "mandatory subject of bargaining" under the National Labor Relations Act, this Court stated in Allied Chemical & Alkali Workers of America, Local Union 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178, that the concept

includes only issues that settle an aspect of the relationship between the employer and employees. See, e.g., NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958). Although normally matters involving individuals outside the employment relation-

Shipping Act. Federal Maritime Commission v. Svenska Amerika Linien, supra. A conference rule in that case prohibited travel agents authorized to book passage for member lines from selling tickets for any nonmember line's steamers. This exclusion of nonmember lines from access to travel agents was closely analogous to denial of access of PMA nonmembers to the joint work force in the present case. The Court in Svenska noted that the rule "seriously interferes with the purpose of the antitrust laws," particularly the prohibitions on group boycotts, and upheld the Commission's finding that the rule violated Section 15.

<sup>&</sup>lt;sup>32</sup> Nonmembers of PMA have indicated their willingness to continue to pay PMA for the fringe benefits their employees receive through the PMA-ILWU fringe benefit programs (App. 188).

ship do not fall within that category, they are not wholly excluded.

Although this definition differs somewhat from the Commission's test whether the agreement is "directed to the labor relations of the contracting employer, visa-a-vis his own employees," in the present case the distinction is immaterial. Here the Revised Agreement was designed to eliminate the competitive advantages that PMA believed nonmembers of PMA had; any effect it had upon "settl[ing] an aspect of the relationship" between PMA members and their employees was minimal.

The Commission determined that "the primary purpose of the Revised Agreement is to bring nonmembers into the PMA 'camp'" (A.P. 62a). PMA admitted that it sought the Revised Agreement because of the "obvious competitive disadvantages" to PMA members when nonmember employers operated during strikes and the competitive advantage nonmembers had because of the ability to have a regular work force and to secure workers during periods of labor shortage (App. 90, 95-98, 102). PMA also considered the ability of nonmembers to "pick and choose fringe benefits on a piecemeal basis" to be "a competitive disadvantage" and an administrative burden for PMA (App. 102; see also App. 89-90). The Revised Agreement (App. 290-293) was drafted to eliminate these disadvantages 34 and place the PMA members and nonmembers on more equal footing (App. 89-91, 95-103). The Commission properly concluded that the Revised Agreement did not relate to a mandatory subject of bargaining.

(b) Paragraph 2 of the Revised Agreement requires a nonmember's separate contract with ILWU insofar as it governs the selection of men for the work force, to conform with the Revised Agreement and the master collective bargaining contract (A.P. 65a). As the Commission found, this requirement effectively imposes on entities that are not members of the collective bargaining unit (PMA) various terms and conditions of the Revised Agreement, such as compliance with PMA labor policies during a work stoppage (A.P. 65a). Once a nonmember signs the Revised Agreement, it is indefinitely bound by the agreement unless both PMA and the ILWU release it (A.P. 65a-66a).

The practical effect of a nonmember's refusal to sign the Revised Agreement is to exclude the non-

basis permitted members of PMA. Under paragraphs 7, 8, and 9, nonmembers must subscribe to all the same fringe benefit programs and other services accepted by members.

<sup>&</sup>lt;sup>25</sup> Paragraph 3 requires nonmembers to observe the same work stoppage policies as members. Paragraph 5 restricts nonmember employment of regular employees to the same

Paragraph 6, which the Commission found to impose work rules agreed to by PMA and ILWU on nonmembers, was subsequently rendered ineffectual by affirmance of the National Labor Relations Board decision in International Long-shoremen's and Warehousemen's Union (California Cartage Co.), 208 NLRB 994, enforced without opinion sub nom. International Longshoremen's and Warehousemen's Union v. National Labor Relations Board, 515 F. 2d 1017 (C.A.D.C.), and Pacific Maritime Association v. National Labor Relations Board, 515 F. 2d 1018 (C.A.D.C.). That provision, however, was not considered decisive of the status of the agreement under Section 15 by either the Commission or court of appeals.

member from the joint work force; as the Commission found, this effect virtually ensures that nonmembers will sign the agreement (A.P. 62a, 69a-71a). The ports cannot secure the skilled longshoremen they need, particularly heavy equipment operators, from outside the joint work force (A.P. 71a, n. 18; App. 186). Furthermore, even for nonskilled workers the ports have used only the joint ILWU-PMA hiring hall, and have no source of such workers outside those halls (App. 220).

The Commission found that even if the ports could obtain qualified non-ILWU workers, ILWU members employed by PMA stevedoring companies to load and unload cargo would refuse to work the cargo in the ports, and that ILWU undoubtedly would establish picket lines at the entrances to all the ports' terminals. These actions would effectively stop the movement of cargo to or from the terminals by other workers who are members of the ILWU or other unions (A.P. 70a-71a; see also App. 60).

Thus, the Revised Agreement not only attempts to impose conditions upon persons outside the bargaining unit, but is virtually certain to succeed in doing so. 35

As the Commission stated (A.P. 66a), the Revised Agreement "'bear[s] a striking resemblance' to that found unlawful \* \* \* in United Mine Workers v. Pennington." In Pennington the Court held that the antitrust labor exemption would not cover an agreement between a union and large coal-operators "to impose the agreed-upon wage and royalty scales upon the smaller, nonunion operators, regardless of their abil-

If the ports contracted the work on their docks to PMA stevedores instead of signing the Revised Agreement, they would surrender significant control over the quality of services provided by their ports and the charges at their facilities (see A.P. 71a; App. 59). They might be placing control with persons with adverse interests. As the Commission noted, stevedoring companies could divert cargo from one port to another where they are able to operate more efficiently (App. 52; A.P. 71a) by simply granting different rates for each area (A.P. 71a).

<sup>&</sup>lt;sup>34</sup> ILWU presumably would oppose any attempts by the ports to train their own skilled workers as a separate ILWU registered work force. ILWU historically has insisted on controlling the size of the regular work force and dividing work opportunities equally among regular workers. During World War II, it opposed the establishment of a branch hiring hall in San Francisco for a work force larger than that in the entire northwest. Waterfront Employers Association, 26 War Lab. Rep. 514, 520, 543-544.

<sup>35</sup> Although PMA generally will admit anyone to membership, becoming a member would not be a workable alternative for nonmembers to signing the Revised Agreement. As a member, the port would also have to forego the advantages of a separate labor contract that it now enjoys. In addition, substantial unrebutted evidence shows that PMA is overwhelmingly controlled by carriers, whose interests potentially conflict with those of the ports (App. 52, 64-65) and who might find it economically advantageous to divert cargo to other ports. There have been a number of recent Commission cases involving diversion of cargo from smaller and less accessible ports by carriers utilizing containerization. See Delaware River Port Authority v. Federal Maritime Commission, 536 F. 2d 391 (C.A. D.C.); Intermodal Service to Portland, Oregon, 17 FMC 106; Pacific Coast European Conference, 14 FMC 266; Sea-Land Services, Inc. v. South Atlantic & Caribbean Line, Inc., 9 FMC 338.

represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large, unionized operators" (381 U.S. at 664). The Court rejected the union's claim that "since such an agreement concerned wage standards, it is exempt from the antitrust laws" (ibid.), ruling that "the policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit" (id. at 668).

The Commission here pointed out (A.P. 67a-68a, footnote omitted): "Instead of a system of computing wages, which because of difference in methods of production would be more costly to one set of employers than another [as in Pennington], the PMA and ILWU here have devised a scheme whereby the elimination of all local agreements between nonmembers and the ILWU would result in higher costs to one set of employers (the nonmembers) than to another (PMA members); particularly, since the differences in methods of operation and locality are ignored." As in Pennington, the Revised Agreement here involves an agreement between an association of employers and a union designed to control labor standards and conditions of third persons, namely, nonmembers of the association.

The Revised Agreement is similar to the agreement in *Pennington* in another respect: the union here has "surrender[ed] its freedom to act in its own interest vis-à-vis other employers" (381 U.S. at 667). The

ILWU cannot bargain on behalf of its joint work force members who work for nonmembers of PMA, to secure terms or conditions of employment for those employees that are more favorable to the nonmember employers than those of PMA members.

In sum, the record supports the Commission's conclusion (A.P. 70a-71a) that while the Revised Agreement will have "little if any effect on the collective bargaining process," it has "a potentially severe and adverse effect upon competition." In these circumstances, the Commission properly denied the Revised Agreement a labor act exemption and properly undertook "consideration of its approvability under the standards" of the Shipping Act (A.P. 70a).

- ment as a claim "that they are being forced against their wills into a multi-employer unit [namely, PMA]," concluded that this was an issue "within the realm of National Labor Relations Board expertise" and not cognizable under the Shipping Act (A.P. 37a). The court stated that "the NLRB has more experience in interpreting contested bargaining terms than the FMC" (ibid.). It further stated (id. at 37a-38a) that since "identical claims" to those before the Commission are pending in antitrust cases (see note 15, supra, p. 12), the antitrust courts "are the proper forums for resolution of the issue."
- a. In considering the Revised Agreement under Section 15 of the Shipping Act, the Commission would not be required to determine any question relating to the appropriate bargaining unit. The National Labor

Relations Board determined the appropriate unit for the west coast shipping industry many years ago (see supra, pp. 5-6) and only the Board can reexamine or change that determination.<sup>36</sup> In deciding the issues under the Shipping Act, the Commission accepts, as it must, the bargaining units the Board has designated.

The fact that there may be questions under the National Labor Relations Act regarding some provisions of the Revised Agreement does not mean that the agreement has a labor exemption and is thus beyond the Commission's scrutiny. As Mr. Justice Harlan stated in his concurring opinion in Volkswagenwerk, supra (390 U.S. at 286), there is "no warrant for assuming, in advance, that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both." Cf. Meat Cutters v. Jewel Tea, 381 U.S. 676, 684-688; Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, supra, 421 U.S. at 626.

This Court similarly has recognized that cases involving the interface between union activities and motor carrier regulation may raise related but separate labor and regulatory issues respectively cognizable by the National Labor Relations Board and the Interstate Commerce Commission. Local 1976, United Brotherhood of Carpenters v. National Labor Relations Board, 357 U.S. 93, 109-111; Burlington Truck Lines v. United States, 371 U.S. 156. In Burlington the Court described its Local 1976 decision as "conclud[ing] that although 'common factors may emerge in the adjudication of these questions' under the two Acts by the two different agencies, nevertheless independent consideration and resolution were possible, the National Labor Relations Board directing itself to consideration of whether the employees violated their duties under § 8(b) and the Interstate Commerce Commission directing its attention to whether the carrier 'may have failed in his obligations under the Interstate Commerce Act'" (371 U.S. at 173).

The fact that the National Labor Relations Board has greater experience than the Commission "in interpreting contested bargaining terms" (A.P. 37a) is beside the point. The determination whether the Revised Agreement has a labor exemption turns primarily upon the comparative impact on Shipping Act and labor interests of subjecting the agreement to Commission scrutiny. That inquiry, requiring as it does a balancing of those interests, is a matter calling for the expertise of the Commission.

b. The court of appeals' theory that the pendency of the antitrust cases raising the same issues as those presented to the Commission under the Shipping Act

be enlarged without the consent of all parties, including any additional employers to be made part of the unit. Western States Regional Council No. 3, Woodworkers V. National Labor Relations Board, 398 F. 2d 770, 773 (C.A. D.C.); Komatz Construction, Inc. v. National Labor Relations Board, 458 F. 2d 317, 321 (C.A. 8); Douds V. International Longshoremen's Association, 241 F. 2d 278, 281-283 (C.A. 2).

ousts the latter agency of authority to consider those issues reverses the normal rule governing the relationship between the antitrust court and the agency. The usual practice is for the court preliminarily to defer to the expert agency, not for the latter to abdicate its role to the courts. Cf. Far East Conference v. United States, 342 U.S. 570, 574-576. The court of appeals' ruling is particularly anomalous under the Shipping Act, since if the Commission approves the Revised Agreement under Section 15, the resulting antitrust exemption will end the antitrust cases. The proper "accommodati[on] [of] the complementary roles of courts and administrative agencies in the enforcement of law" (Far East Conference, supra, 342 U.S. at 575) requires that the Commission proceedings have precedence over, and not be subordinate to, the pending antitrust cases.

In conclusion, we reiterate that the Commission has not decided anything with respect to the merits of the agreement under Section 15, but only has made the threshhold determination that the agreement must be filed with it. If the Court agrees with us that the Commission correctly held that that section covers the agreement, the agency will then decide whether the agreement is valid under that section and under Sections 16 and 17. The Commission may approve the agreement under Section 15 if appropriate circumstances are shown, thereby giving it antitrust immunity; or the agency may disapprove it under any of those sections. Its final action is subject to review in the court of appeals.

The only issue before this Court now is whether the Commission is barred from even scrutinizing the agreement to determine whether it meets the substantive standards of Section 15. For the reasons set forth above, the Commission properly concluded that the agreement is not exempt from that section.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1977.

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# In the Supreme Court

OF THE

## Anited States

OCTOBER TERM, 1977

No. 76-938

FEDERAL MARITIME COMMISSION and United States of America, Petitioners,

VS.

Pacific Maritime Association, International Longshoremen's and Warehousemen's Union, et al.,

Respondents.

## BRIEF FOR INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

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## In the Supreme Court

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OCTOBER TERM, 1977

No. 76-938

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, Petitioners,

VS.

Pacific Maritime Association, International Longshoremen's and Warehousemen's Union, et al.,

Respondents.

# BRIEF FOR INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

## I. QUESTIONS PRESENTED

- 1. Does the Federal Maritime Commission, under section 15 of the Shipping Act, 1916, 45 U.S.C. § 814, have jurisdiction over the terms and provisions of collective bargaining agreements?
- 2. Are any of the terms of employment, including the fringe benefit programs, which the ILWU bargained for on behalf of the longshoremen of the

Pacific Coast in 1972 subject to filing and approval or modification by the Federal Maritime Commission prior to and during their implementation?

### II. COUNTERSTATEMENT OF THE CASE

While it is unnecessary to reiterate the means by which this case has reached the Court there are several crucial elements in that progression which have thus far been neglected. In overruling its Hearing Counsel below, the Commission found itself to be the proper forum for what are essentially labor and, at the periphery, antitrust matters. This it did by making substantive determinations hitherto thought to be within the jurisdiction of the National Labor Relations Board and the federal courts.

The Commission classified the subject matter of the agreements as non-mandatory items of collective bargaining without describing either the bargaining history or analyzing the case law in the area, found the ILWU likely to engage in specific collective activities without considering that the activities, if engaged in, would be labor practices either protected under the National Labor Relations Act or prohibited thereunder, and made a determination as to the proper scope of the bargaining unit regardless of the NLRB's statutory responsibility in this area.

In making its jurisdictional determination the Commission relied upon a test of its own devising, a test which it presents as a correct distillation of this Court's decisions in the labor/antitrust area. Yet the

Commission found it unnecessary to decide the issues of conspiracy in restraint of trade or predatory intent, held the terms of section 15 to evince a legislative intent to bring collective bargaining agreements under the Commission's pre-implementation scrutiny and analyzed this Court's decisions as authorizing the creation of a labor exemption from the Shipping Act "analogous" to that under the antitrust laws.

The ILWU thus finds itself subject to the de facto jurisdiction of the Commission and finds its agreements and activities subject to the Commission's approval although the ILWU is not a "person" subject to the Shipping Act.

### III. SUMMARY OF ARGUMENT

In Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261 (1968), the Court drew a distinction, for Shipping Act purposes, between collectively bargained agreements and arrangements among employers implementing collective bargaining agreements. The Court rejected both the position that all agreements implementing collective bargaining agreements were exempt from section 15, simply because they were linked to collective bargaining agreements, and the position that the Commission had jurisdiction over bona fide collective bargaining agreements. The Court was clear that agreements which were collectively bargained between labor and management were not subject to section 15 scrutiny. Nevertheless, the Commission has now clearly stepped across the line drawn in Volkswagenwerk and has asserted jurisdiction over the substantive terms of a collectively bargained agreement which covers the systems of hiring, work allocation, fringe benefit programs and terms of employment in the longshoring industry of the Pacific Coast. The Commission, apparently, finds the provisions of the Shipping Act-which it administers—to be so like the antitrust laws—which it does not administer-that it can justifiably determine whether to grant a "labor exemption" to a collective bargaining agreement. It does so by means of a four-prong test which the Commission believes to be a distillation of the labor/antitrust exemption cases of this Court. Not only is the test ill-conceived, it was erroneously applied to the collective bargaining agreement involved in this case. While the Commission holds itself authorized to "balance" labor and shipping concerns, not a single one of the four elements of the test-each of which is considered a condition precedent to the so-called labor exemption to the Shipping Act-includes a Shipping Act concern. In its analysis of matters outside its expertise, the Commission ignored both the bargaining history and bargaining realities of the longshore industry. More fundamentally, despite the Commission's emphasis on labor-related matters, it remained resistant to the national labor policy which denies to any administrative agency the power to fix, approve or modify the substantive terms of collective bargaining agreements prior to their implementation.

The court of appeals below concluded that collective bargaining agreements were not within the intent of the legislative history of the Shipping Act, that the substantive determination as to the classification of subjects of bargaining was not within the Commission's expertise, and that the reconciliation of the labor and antitrust laws was within the federal courts', not the Commission's, competence. That court held, contrary to the Commission, that the law, if careful attention were given to the history and practicalities of collective bargaining, was more consistently interpreted by exempting collective bargaining agreements as a class from the pre-implementation requirements of section 15. The ILWU seeks the affirmance of the court of appeals' decision which corrects the Commission's error.

### IV. THE HISTORY AND MEANING OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN PMA AND THE ILWU

The ILWU has bargained with the Pacific Maritime Association, with the federal government's approval, for more than forty years over substantially the same terms of employment as those which the Commission now seeks to bring under its own aegis. The significance to the dockworkers of the terms of employer access to the labor pool cannot be overemphasized. Yet the Commission was totally insensitive to the effect its assertion of jurisdiction would have upon the men of the Pacific Coast longshore industry, the ILWU and collective bargaining in the maritime industry.

Although the Commission challenged the validity of the entire collective agreement (Appendix [hereinafter "App."], pp. 9-13, 21-25, 194-97), it focused on only one part of it, Supplemental Memorandum No. 4, which sets out the terms upon which a major portion of the longshore labor force is to be made available to employers on the West Coast (App. pp. 290-93). That portion, called the registered, or joint, work force, is the lynchpin of a series of industry-wide institutions which are also the subject of the Memorandum. The federal government not only played a major role in the creation of these institutions, it has repeatedly approved them as essential to industrial peace in the longshore industry.

The General Strike of 1934 was postponed by the intervention of President Franklin Delano Roosevelt. On May 22, the day before the maritime unions of the Pacific Coast were to bring the industry to a standstill, he appointed a three-man board to attempt a resolution of one of the most intractable problems facing both the employers and the employees in the longshore industry. The livelihood of longshoremen, both in this country and abroad, had suffered for decades in an industry in which employment was not only irregular and based upon the itinerate arrivals of vessels, but in which there had always been a persistent oversupply of labor.

<sup>1</sup>Larrowe, Shape-Up and Hiring Hall. University of California Press (Berkeley and Los Angeles, 1955) p. 96 et seq.

The National Longshoremen's Board soon became aware that essential to any effective solution of the chronic turmoil in the longshore industry was the creation of new, coast-wide, centralized institutions capable of reconciling the fluctuating demand for labor with the need for stable employment. The institutions which resulted from the encouragement of the federal government-a registered work force, the hiring halls, central pay and record offices, pension plan, vacation and holiday plan, pay guarantee plan, welfare and mechanization plans-were the most innovative of their day, and their success can be measured by the long period of comparative industrial peace they have fostered (App. p. 87). It is the most crucial of these institutions, the one upon which all others rest, that is being attacked by the petitioners in this case.

The ports at whose behast these proceedings were instituted and on whose behalf they are being prosecuted (hereinafter, "the Ports") are not members of the Pacific Maritime Assocation and were originally beyond the pale of the first coastwide agreement struck between PMA and the ILWU under government supervision. In its certification of 1938, the National Labor Relations Board concluded that the ILWU was the exclusive representative for purposes of collective bargaining of all workers employed by

<sup>&</sup>lt;sup>2</sup>Keller, Decasualization of Longshore Work in San Francisco. Works Progress Administration National Research Project (Philadelphia, 1939) pp. 1-15.

<sup>&</sup>lt;sup>3</sup>PMA is the successor to the Waterfront Employers' Associations which functioned on a coast or port basis in 1934. Herein, references to PMA are meant to include these predecessors.

<sup>\*</sup>The International Longshoremen's and Warehousemen's Union is the successor to the International Longshoremen's Association.

the multi-employer bargaining unit which encompassed virtually every longshore employer on the Pacific Coast. The ILWU has, since that time, consistently and vigorously represented all longshoremen who work for those employers, regardless of their union affiliation or union status, and made all such workers beneficiaries of the coastwide agreements negotiated since that time. The NLRB, like the National Longshoremen's Board, adopted the view that the "loss of the strikes in 1916 and 1919 was due to the lack of proper coast coordination among longshoremen which permitted the companies to play one port against the other," and concluded that there was an essential need for a single coastwide agreement rather than company or separate port agreements.

The essence of the union position in 1934, in 1938, and continuously to the present day has been that solidarity among the longshoremen of the Pacific Coast is essential to the prevention of any resurgence of the exploitation by wage competition which had been implemented by the whipsawing of the union between the employers and ports of the Pacific Coast.

In 1946 the federal government, this time in the form of the War Labor Board, once again encouraged

<sup>5</sup>In the Matter of the Shipowners' Association of the Pacific Coast, 7 N.L.R.B. 1002 (1938).

<sup>1</sup>In the Matter of the Shipowners' Ass'n of the Pacific Coast, 7 N.L.R.B. 1002 at 1008 (1938).

the centralized institutions by resisting an attempt by the employers to substitute steady gangs for the centralized rotational hiring practices won by the union. The federal government did not favor the alleged virtues of efficiency which the employers urged in support of steady gangs; rather, it recognized that the "countervailing vices of favoritism and inequality of work opportunity" which steady gangs engendered were in direct opposition to the fundamental objective of the union: equalization of job opportunity."

Longshoring has been and continues to be a trade typified by irregular employment and the victim, like other labor-intensive semi-skilled trades, of an oversupply of labor. The backbone of the 1934 National Longshoremen's Board award was the creation of a system of control of access to the labor force by means of joint union-employer registration of men at each port and port dispatch/hiring halls, all now under the ultimate control of a joint coast Labor Relations Committee.

If the force is too large it encourages wage competition among the men, if it is too small the employers must either reduce their economic activity or seek men outside the bargaining unit. The size of the registered work force is thus critical, the result of a delicate balance struck by the union and the employers' association based upon an analysis of

with one type of citizen on the foundation of equitable work assignments." [Waterfront Employers Assin, 26 War Labor Reports at 538 (1945).] See Keller, pp. 41, 43, 51-78.

<sup>\*</sup>Waterfront Employers Association, 26 War Labor Reports 514 at 538 (1945).

<sup>\*</sup>See Keller, pp. 36-43; Larrowe, pp. 151-63.

<sup>16</sup>Keller, pp. xvii-xix, 51 et seq.; Larrowe, pp. 150-3.

the job opportunities the association is likely to offer and the available work force.

"The establishment of the roster of registered longshoremen was the first duty of the joint Labor Relations Committee set up by the award in 1934" and it remains the trust of the ILWU in 1977. Because it has stabilized the work force by means of the registration lists and hiring halls, the union has been able to establish safety and grievance procedures, experiment with medical, pension, vacation, guaranteed minimum income, and mechanization plans for casual workers, building, in the process, the present package of contract benefits.

A member of the registered work force obliges himself to be available, upon precise terms negotiated by the ILWU with PMA member employers and those non-members who participate in the joint programs. In return, he is offered preference of employment with those employers and the comprehensive contract benefits. This "decasualization," which means no more than the encouragement of stability in the industry, has been at the heart of collective bargaining on the Pacific Coast for over forty years. It is essential to the creation of a career which guarantees a dignity to the working man that the earlier competitive labor market had always denied him. In short, the men of the registered work force have become the employees of PMA members.

The Commission below refused to credit these facts because the registered men also work for other employers, like the Ports (Appendix to the Petition for Certiorari [hereinafter "A.P."] at p. 62a). To suggest, as the Commission does, that employees who are not fully employed by any one employer, as is typical in the longshore trade, are thus denied their status as employees of PMA members is to completely misinterpret the basis of collective bargaining on the Pacific Coast.18 The whole purpose in creating the registered force was and is to maintain an individual's status as an employee of PMA members regardless of the availability of work at any given place or time. Indeed, the package of fringe benefits, particularly the pay guarantee, paid vacation, pension and mechanization plans, were developed to provide for these employees when they were not employed by PMA members. The quid-pro-quo for this protection is that PMA members and non-member employer participants have first-call on the members of the registered force. It is precisely this arrangement which brought the turmoil of the 1920's and 1930's to an end by giving to longshoremen, for the first time in history, the possibility of the industrial security typically available, to men in other, more stable, industries.12

<sup>&</sup>lt;sup>11</sup>Keller, p. 25.

<sup>&</sup>quot;Although the availability of men outside the registered force was made clear to the Commission (App. pp. 91-92), the Commission's Order does not contain any analysis of the labor pool and fails to distinguish between the registered force and the longshore labor force as a whole. That the men of the registered force have "jobs" with PMA member employers is indicated in the very first paragraph of Supplemental Memorandum No. 4 (App. p. 290). "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer." Section 2(3) NLRA, 29 U.S.C. § 152 (1947) (emphasis added).

<sup>18</sup> See Keller, passim, and Larrowe, pp. 83-115.

### V. THE FEDERAL MARITIME COMMISSION DECISION

### A. The Commission's Conceptual Errors

The Federal Maritime Commission, not grasping the implications of this bargaining history, inevitably misunderstood Supplemental Memorandum No. 4. The Commission sliced off the "master" agreement, that is, the body of the collective bargaining agreement, by ignoring its detailed mechanisms for the allocation of men" and "the system of industrial jurisprudence which has evolved for the administration of the agreement." The Commission then declared Supplemental Memorandum No. 4 to be a non-mandatory item of bargaining (A.P. pp. 61a-62a, 69a. This insupportable conclusion resulted from a lack of understanding that the registered work force exists solely under the aegis of the ILWU-PMA collective bargaining agreement (A.P. pp. 67a, 69a, 70a; App. pp. 225-315).

Petitioners concede that casual labor exists on the Pacific Coast and is sufficient to fill the manpower needs of the Ports (App. pp. 186-87, 219-21; A.P. pp. 70a, 71a), but suggest that the registered work force is better skilled and is in the nature of an essential industry resource which the Ports must use to continue in operation (App. pp. 51-61). The Solicitor General equates the men of the registered work force with the "single bridge over the river" discussed in *United States v. Terminal Railroad* 

Association of St. Louis, 224 U.S. 383 (1912).38 Two fallacies underlie this conception. First, and most importantly, "the labor of a human being," unlike a bridge, "is not a commodity or article of commerce."17 Freedom of access to a bridge or inanimate resource by all the competitors in an industry leads only to additional wear and tear and perhaps a lower return on investment; freedom of access to the labor of an individual, as was true in the longshore industry prior to the 1934 agreement, leads to the loss of his integrity and, ultimately, to the loss of his dignity as a human being. Second, the registered work force is not a pool of skilled labor compelled by the union or circumstance to act as an indivisble unit. The men of the registered work force are career employees as opposed to casual employees, not skilled employees as opposed to unskilled employees.18 The men of the registered work force have, since the beginning. been simply those men who depend primarily upon the longshore trade for the basis of their livelihood. It is they who are thus eligible for, and capable of being the beneficiaries of, the panoply of centrallyadministered contract rights which are a very substantial portion of a dockworker's earnings.10 Each member of the registered work force retains the freedom, which has been exercised from the beginning of the registered force, to select his status within

<sup>&</sup>lt;sup>14</sup>App. p. 203. The investigation of the "Master" Agreement, though ordered, has yet to take place. See App. pp. 12, 13, 22-25, FMC Order and Supplemental Order of Investigation.

<sup>18</sup> Larrowe, p. 85.

<sup>16</sup>Petitioners' Brief p. 43, n.31.

<sup>&</sup>quot;Clayton Antitrust Act, section 6, 15 U.S.C. § 12 (1914).

<sup>18</sup>Keller, pp. 24-34.

<sup>19</sup> See App. p. 89.

the bargaining unit and the nature of his employment. It would hardly need reiteration, but for the
petitioners' misconception of men as an inanimate
resource, that closed shops have been forbidden, at
least since the advent of the Taft-Hartley Act. Registration now means the benefit programs which
are an essential component of a longshoreman's earnings. There would have been, and there can be, no
such benefits if control of employer access to the
labor force had not been jointly shared by the ILWU
and the PMA.

While it now seems unlikely that any group of employers would go to the expense of creating a new fringe benefit program comparable to that administered by the Pacific Maritime Association, petitioners' brief neglects to mention that there is nothing in the agreements between the ILWU and PMA to prevent that development (App. pp. 91, 123, 208). As counsel for the ILWU we would not be surprised if the ILWU rejected any new program that involved an abandonment of control over the size of the labor force thus risking a resurgence of wage competition among the men to be so benefited. If the Ports wished to compete with the members of the Pacific Maritime Association for the men of the registered force they could offer to establish a comparable benefit program

∞Keller, pp. 28-29.

with sufficient added inducements to encourage the registered men to work on a new basis. There is no suggestion that the Ports have made or have any intention of making such an offer. They have repeatedly negotiated with the ILWU for access to longshore labor upon the condition that they, too, have access to the Pacific Maritime Association's fringe benefit program (App. pp. 91, 187-88).

For the Ports to complain that this arrangement somehow restricts their freedom of contract is disingenuous at best; for the FMC to hold that the ILWU is likely to engage in acts unlawful under the NLRA in an attempt to enforce an agreement which, the petitioners and the Ports claim, is directed toward ending any possible competition over fringe benefit programs among employers is unconscionable. On the contrary, the ILWU sees its agreement with PMA as forcing the Ports to make a clear decision on the creation of an independent program or the acceptance of the best package now available on the West Coast. The policy of the ILWU is to increase the number of men eligible for the highest benefits, thus reducing wage competition and improving living standards (App. pp. 101-03, 122-23). It can do so either through encouraging competition among the employers or by encouraging the adoption of the presently and realistically available industry-wide programs. This is the antithesis of the closed union or "unique resource" which is suggested in the allegations of the petitioners. While it is understandable that the Ports resist such developments out of

Respondents do not seriously dispute that the provisions for preference of employment by reason of union membership are clearly proscribed by the Act." In the Matter of International Longshoremen's and Warehousemen's Union, 90 N.L.R.B. 1021 at 1026 (1950).

self-interest,<sup>32</sup> it is not appropriate that they should cast the industrial background in a false light, choosing the forum, of those available, with the greatest likelihood of adopting such a foreshortened perspective.

## B. The Handling of the Agreement by the Commission

That the FMC was a forum susceptible to misinterpretions of collective agreements is evident from its analysis of the Supplemental Memorandum. For example, Section 2 was found by the Commission to be a substantial imposition of terms upon the Ports (A.P. pp. 63a, 69a). That section requires that the terms of other contracts not be inconsistent with those sections of the "master agreement" (the "PCLCA") and of Supplemental Memorandum No. 4, which establish the basic mechanism of the joint work force -the registration lists. Given the history described above, it should be apparent that nothing is as crucial to the ILWU and the men it represents as joint control over the terms of admission to the registration list and the right of preferred employment it represents." Without it, the entire structure of collective bargaining in the longshore industry collapses. It is no exaggeration to say that if the ILWU cannot effectively bargain for the terms of entry to that list, the raison d'etre of the union vanishes (see Keller, pp. 16-50).

Significantly, this section of the Memorandum asks only for conformity with the basic practices pertaining to the registered work force. Hence, particular manpower problems in particular areas are clearly left open for negotiation as long as the basic system of introducing new members and disciplining present members on the list remains intact. The ILWU cannot contemplate giving up the primary tool by which it participates in the control of the size of the work force, and it is apparent that the ILWU has merely preserved its right to negotiate adjustments to that mechanism where circumstances require (see, e.g., App. p. 271). If this mechanism is being imposed on the ports, then it is imposed by its creators, the National Longshoremen's Board and over forty years of labor relations history.

Section 3 is an agreement that the employees of PMA, the registered work force, will be supplied to other employers only upon the same, and no better, terms than to PMA members. This is the price the ILWU paid for the terms of employment in the 1972 agreement which cover the vast majority of Pacific longshoremen. Section 5 secures the integrity of the dispatch hall system through which the union jointly controls work allocation and the use of steady gangs. Steady gangs were, and are potentially today, one of the greatest sources of industrial strife and wage competition (see p. 9, supra). In the past employers would use a steady gang, assuring the

The roots of the trouble strike deep: for the dispute is an important example of a larger conflict, the natural opposition of management to the necessarily levelling effects of trade unionism." Waterfront Employers Association, 26 War Labor Reports 538 (1945).

<sup>23</sup> Supra, Section IV.

gang employment but preventing other men from working except upon exploitative terms. The straw boss would have to be bribed at the morning shape-up with part of the newcomer's pay if a new man was to work that day. The result, given the oversupply of men willing to work, was to set laboring man 'against laboring man in trying to curry the straw boss' and the employer's favor.24 To end this wage competition, which forced men's wages to the minimum, and the favoritism which robbed them of what dignity remained at a minimal standard of living, the National Longshoremen's Board sanctioned the creation of jointly-administered dispatch halls which assured the rotation of gangs from employer to employer, breaking the link between a particular employer and "his" steady gangs,25

At present the contract does allow PMA members, as well as the Ports, the use of steady men, but only on specific terms,<sup>26</sup> the dispatch hall assuring equal sharing of the available jobs and gang rotation, where necessary, in order to prevent the abuses of the past. The speculations of petitioners and of the Ports (Petitioners' Brief pp. 7-14) that the ILWU will demand changes in these practices as a consequence of its accepting the Supplemental Memorandum are not supported by its terms. Nor is there any evidence in the record that the ILWU has de-

<sup>24</sup>See Larrowe, pp. 2-4, 25-26, 49-82, 185.

manded or will demand changes as a consequence of this Memorandum.

Sections 4, 7 and 8 of the Supplemental Memorandum essentially fulfill the ILWU's demand that every member of the registered force receive all the benefits of the programs negotiated with PMA no matter whom the individual works for. The registered men can thus earn their credits under the PMA pension, welfare and vacation plans even though PMA employers do not have sufficient work for each man. In addition, they broaden the coverage of the Central Pay and Record Offices.

Allowing men to earn their credits no matter where they work on the Coast helps to fulfill one of the primary goals of the ILWU: the elimination of differentials whether in the form of wages or benefits (see discussion, pp. 14-16, supra). The central pay and record offices make it possible for the men to receive a single paycheck and permit national Social Security withholding. For years men were paid each Friday in coin at each place they had worked along the waterfront. Not only was this enormously inconvenient, it required a man to keep track of how long he had worked for each employer each day of the week\* and was a boon for waterfront hangers-on and saloonkeepers. At present, the central pay and record offices eliminate these potential abuses and allow for the administration of one of the most extensive benefit programs for casual labor available in the United States.

<sup>&</sup>lt;sup>25</sup>See Larrowe, pp. 102-03. The dispatcher is elected by the members of the union, but he is employed by, and under the direction and control of, the joint labor relations committee.

<sup>26</sup> See App. p. 303 et seq.

<sup>&</sup>lt;sup>27</sup>Larrowe, p. 93.

Section 9 makes the terms upon which nonmembers participate in the industry-wide institutions identical with those of PMA members. This is not only an assurance that the terms for nonmembers will not be more burdensome than for members but also that nonmember participants may not fall below the standard set by the terms of access by attempting to "stand still" while benefits are rising to meet the needs of the registered force.

Sections 10 and 12 of Supplemental Memorandum No. 4 were found by the Commission to be an interference with the freedom of the Ports' labor policy. There is no basis for the Commission's conclusion. The men of the registered force are not and should not be regarded as an indivisible work force which could be used to bludgeon the Ports into PMA. The provisions are only binding on those who choose to employ registered dockworkers and participate in industry institutions, and the ports are free to refuse to do so. More importantly, what is ignored by the Commission is the consistent long-term policy of the ILWU to equalize wages, benefits and work opportunities. Should a dispute arise with PMA during the contract term over the registered force, the entire force will be made idle on the same basis. Each man has been and will be treated as his fellow member in any dispute over the registered force." Each employer of the registered force will prosper or suffer identically with every other." Given the geographic "whipsaw" would be of only marginal utility to the ILWU. It is more important to the union that the solidarity of its members, generated by equal treatment, be maintained in times of industrial strife."

### VI. THE DECISION OF THE COURT OF APPEALS

The court of appeals recognized that the reconciliation of the competing policies and statutory schemes relating to shipping, antitrust and labor concerns was a difficult one. Because it found that "the prior-restraint procedures of section 15 impose such an extraordinary burden on collective bargaining" (A.P. p. 2a), it concluded, following this Court's lead in Volkswagenwerk, that the dividing line, so far as concerns the Commission's jurisdiction, must be drawn between "labor-related agreements among employers . . . and direct agreements negotiated between union and management . . ." (ibid.). The former were held to be subject to the Commission's jurisdiction. The latter were not.

The ILWU submits that this is a rational and sensible approach to the problem and that the judgment of the court of appeals should be affirmed.

<sup>38</sup>See n.6, supra.

<sup>29</sup> See App. p. 34.

<sup>&</sup>quot;See text at n.7, supra.

### VII. ARGUMENT

### A. Svenska Does Not Support FMC Jurisdiction Over Collective Bargaining Agreements

The labor exemption to the antitrust laws is the product of a long and intricate interaction between this Court and Congress over the last many years. It is not merely an adjustment of jurisdiction over various enactments, it is the result of the clash between two major national policies as embodied in legislative landmarks.31 It is not the result of a silent legislative history or one that is "unilluminating" (Petitioners' Brief, p. 24, n.25) or stated in "broad language" (Petitioners' Brief, pp. 19, 23), but is the result of repeated attempts by court and legislature to deal with one of the most intractable of modern jurisprudential inquiries.32 At no point in this development has Congress or this Court ever encouraged the Federal Maritime Commission to play a role or involve itself in the law of labor relations.

The Government relies upon this Court's decision in Federal Maritime Commission v. Aktienbolaget Svenska Amerika Linien, 390 U.S. 238 (1968), as a springboard to a claim of authority to enforce anti-

<sup>23</sup>Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890); Clayton Antitrust Act, 15 U.S.C. §§ 12-27 (1914); Norris-La Guardia Act, 29 U.S.C. §§ 101-15 (1932); Labor Management Relations Act, 29 U.S.C. §§ 141 et seq. (1947).

trust principles and to supervise maritime labor relations even though the latter are tied to the anti-trust laws only because they are generally exempt from their application.<sup>33</sup>

In Svenska, this Court merely upheld a Commission rule which allocated the burden of proof in approval hearings under the Shipping Act where a per se antitrust violation had been committed by parties subject to the Shipping Act. The Court, relying upon the recently added words of section 15, "contrary to the public interest," agreed with the Commission that sensitivity to the antitrust laws is appropriate when considering the exemption of an agreement clearly within FMC subject-matter jurisdiction. Even so, the Court made it clear that the Commission must cast its decision in terms of section 15 criteria.

The Court did not, however, give the Commission blanket authority to apply the antitrust laws in "the public interest," (Petitioners' Brief p. 33) nor to utilize its tangential concern with antitrust principles to reach beyond its own realm. It certainly did not authorize the Commission to embark upon the sea of labor relations simply because such matters, like some shipping matters, are also exempt from the antitrust laws. Yet the Commission has in the instant case determined not whether Supplemental Agreement No. 4 is exempt under the Shipping Act exemption to the antitrust laws, as in Svenska, but whether this collective bargaining agreement is exempt under the

States v. Hutcheson, 312 U.S. 219 (1941); Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797 (1945); Hunt v. Crumboch, 325 U.S. 821 (1945); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975).

<sup>&</sup>lt;sup>33</sup>Petitioners' Brief pp. 33, 34, 41, 44, n.31.

labor law exemption, although there is nothing in its enabling Act to suggest that it has jurisdiction over collective bargaining agreements.

## B. Volkswagenwerk Removed Collective Bargaining Agreements from FMC Jurisdiction

1. This Court has already decided that section 15 does not extend to collective bargaining agreements. Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261 (1968). In that case an agreement among the members of PMA to allocate the costs of a mechanization fund created by a collective bargaining contract was held to be subject to the Shipping Act where clear price discrimination effects against particular goods had been made manifest. The Court, however, was explicit in holding that it was not considering the collective bargaining agreement, but rather only the agreement among employers as to the method of sharing the costs attendant on the mechanization fund." The agreement now before the Court is not one among employers allocating costs; on the contrary, it is one between the certified representative of employees and an appropriate multi-employer bargaining unit over the terms and conditions of employment.

The bargaining positions of the ILWU and PMA were directly opposed at the initiation of bargaining (App. pp. 88-103, 122-24). The compromise as to the terms of access to the registered work force, which resulted in Supplemental Memorandum No. 4, was

bargained in good faith at arm's length and, given its importance in the context of collective bargaining on the Pacific Coast, concerned a mandatory item of bargaining.35 The union sought to insure that the men of the registered work force would receive the maximum package of benefits regardless of for whom they worked and the employers sought to restrict those benefits to men who worked exclusively for them. se If the union's initial position had prevailed, the men of the registered force would have equal benefits regardless of the distribution of job opportunities along the entire Pacific Coast, precisely in keeping with the long-term ILWU policy of equalizing job opportunities and eliminating wage competition. It is noteworthy that the Commission failed to realize that if the ILWU had not rigorously followed this policy, it would not have insisted that nonmembers have any access at all to the benefit programs. The Ports apparently feel that they have some sort of prescriptive right to the PMA/ILWU institutions (see App. pp. 51-61, 69-71, 84-86, 88-94, 101-03). Yet there was no obligation upon the ILWU to resist PMA's bargaining position which would have forbidden the Ports' participation in the benefit plans

<sup>34</sup> Volkswagenwerk v. FMC, 390 U.S. at 278.

ployer includes the terms of access to the registered force and has acknowledged PMA's right to first-call on that work force (a right shared equally by nonmember participants) and the employees' reciprocal right to the contract benefits. Since the late 1950's each agreement has included the terms of nonmember participation in the benefit institutions (see App. pp. 101-03, 122-23).

<sup>&</sup>lt;sup>36</sup>The opening negotiating positions of the union and the employers are reproduced at App. pp. 106-12.

entirely. The union proceeded as it did, not out of altruism for the Ports, but in pursuit of its historic goal of equal wages and benefits throughout the Pacific Coast."

It was the ILWU that ensured that the benefit programs would remain open to nonmembers like the Ports; for the fact of the matter is that only a bargain with PMA can generate the coast-wide agreement which makes that policy a reality.

The NLRB has long recognized that fringe benefit programs are mandatory items of bargaining, and this Court has settled that mandatory items remain mandatory even if they have consequences upon third parties. "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees," "not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees." National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 at 645 (1967); Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 at 179 (1971).

The intent of Supplemental Memorandum No. 4, like the intent of the agreement in *Teamsters Local* 24 v. Oliver, 358 U.S. 283 (1959), which set the minimum rental that carriers would pay to truck

<sup>27</sup>See Waterfront Employers Association, 26 War Labor Reports at 538 (1945); Keller, pp. 1-2, 36-43, 51 et passim.

owners who were not in their employ, and like the agreement in National Woodwork, which prevented the employer from using certain products, was to preserve the terms and working conditions of employees. The skewed view of the Commission, which saw third party effects as precluding a finding that the subject matter was a mandatory item of bargaining, was precisely converse to that of the Court in Oliver and National Woodwork.

2. The line in Volkswagenwerk was not lightly drawn by this Court. The Court was concerned that its limited ruling not be read as sweeping collective bargaining agreements under the jurisdiction of the FMC. The dispute between the dissent and the Court was not over whether collective bargaining agreements were within section 15 but whether implementing agreements were so firmly linked to collective bargaining agreements as to be likewise outside of section 15. The dispute between the concurrence and the Court was that Justice Harlan believed that collective bargaining agreements might be within section 15. He agreed with Justice Douglas, dissenting, that implementing agreements and collective bargaining agreements were indissoluably linked, but he alone saw no reason to find the FMC incapable of weighing collective bargaining agreements as a whole.

The Commission and the Solicitor General here embrace the view of Justice Harlan, ignoring the clear holding of the remainder of the Court which set collective bargaining agreements outside the Commission's jurisdiction. Implicit in the majority's

which are what Supplemental Memorandum No. 4 is about, are mandatory items of bargaining. Hinson v. NLRB, 428 F.2d 133 (8th Cir. 1970); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949).

strong disavowal of the suggestion that it was ruling on the collective bargaining agreement was its anxiety, confirmed in this case, that the decision might be misinterpreted as sweeping collective bargaining agreements into section 15.

3. The Commission's practice of forcing changes in the substantive terms of agreements by making its approval contingent upon acquiesence in its judgment as to the meaning and impact of those terms30 cannot be reconciled with the freedom of collective bargaining which is the quintessence of the national labor policy. H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970). Petitioners seek to extend the power of the FMC beyond the clear boundaries of the national labor policy in complete disregard of the legislative and judicial protections created to foster that policy. The power petitioners assert for the Federal Maritime Commission is the power to approve and to modify the substantive terms of collective bargaining agreements which have competitive effects on third parties." This assertion is made despite the fact that the "goals of federal labor law never could be achieved if [such effects] on business competition were held a violation of the antitrust laws." Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616 at 622 (1975).

The "unilluminating" legislative history of section 15 has already been analyzed by this Court. In Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 (1973), a unanimous Court rejected such expansive readings of section 15's terms as now argued by petitioners (see Petitioners' Brief, pp. 22-27). Justice Marshall demonstrated that the legislative history confirmed that the word "agreements" was used as a term of art describing "practices or regular activities in which two or more shipping companies have agreed to participate over a considerable period of time," and for that reason "the statute thus envisions a continuing supervisory role for the Commission" (411 U.S. at 740 and 735). Such a role is simply incompatible with "the fundamental principle that the National Labor Relations Act is grounded on the premise of freedom of contract."42 The Court

<sup>&</sup>lt;sup>59</sup>See for example: Agreement No. 57-96 Pacific Westbound Conference Extension of Authority for Intermodal Services, F.M.C. Docket No. 72-46 (1975), Pike & Fischer, 16 S.R.R. 159 at 165, 177, 178.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. [Emphasis added.]

<sup>&</sup>quot;Petitioners' Brief, p. 24, n.25.

<sup>42</sup> H.K. Porter Co. v. NLRB, 397 U.S. 99 at 107 (1970).

Section 15 provides inter alia:

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints. [Emphasis added.]

One can only speculate as to the effect FMC jurisdiction may have, when exercised under its "policing" power, over arguably protected collective activities. The Commission itself suggested the potential for conflicts between itself and the NLRB below, "because there are involved in the National Labor Relations Act

observed that when Congress intended to bring a class of agreements under the control of a regulatory agency, it did so in unambiguous language.42

The Commission his impermissibly extended Volks-wagenwerk, which involved labor-raised agreements, by seizing upon dicta and the single opinion of Justice Harlan to justify a broadened reading of section 15." The Court's own insistence that its holding went only to agreements among employers implementing collective bargaining agreements is lost on the Commission.

The Court could not possibly have meant that collective bargaining agreements were subject to section 15 pre-implementation scrutiny, for it clearly stated that nothing in the opinion was to be understood as questioning the continuing validity of the collective bargaining agreement at issue in Volkswagenwerk. Section 15 provides that no agreement subject to that section can be valid unless filed and approved and there was no question but that the collective bargaining agreement in Volkswagenwerk had not been so filed.

### C. The Labor/Antitrust Cases Do Not Support FMC Jurisdiction over Collective Bargaining Agreements

Having erroneously found that Supplemental Memorandum No. 4 concerns non-mandatory items of bargaining, analogous to the assessment agreement at issue in Volkswagenwerk, although that case expressly did not concern a collective bargaining agreement, the Commission concluded that the terms of Supplemental Memorandum No. 4 are "strikingly similar" to the agreements analyzed in United Mine Workers v. Pennington, 381 U.S. 657 (1965), and that the "primary purpose" of the Supplemental Memorandum was to force the Ports, not out of business, but into the Pacific Maritime Association. Even though Supplemental Memorandum No. 4 does not require nonmembers to join PMA\* the Commission found a curious analogy between the ILWU and the Mineworkers conduct by equating a "primary purpose" of forcing nonmembers into PMA with the "predatory purpose" of driving small operators out of business. Apparently, regarding this intent as essentially the same as the predatory intent requirement of Pennington," the Commission went on to consider the effect not of the Ports' entry into PMA but of their refusal to sign Supplemental Memorandum No. 4. There is no conclusion or finding concerning the effect of Supplemental Memorandum No. 4 had the Ports succumbed to the alleged "imposition," nor is there a finding that

and the Shipping Act, 1916, two different purposes, it would not necessarily follow that a holding under NLRB concepts would be equally applicable to our responsibilities under the [Shipping] Act." (A.P. pp. 56a-57a, n.9). See San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); NLRB v. American Nat. Ins. Co., 343 U.S. 395 (1952).

unions are not persons subject to the Shipping Act and that the basis upon which the Commission seeks to retain jurisdiction over the collective bargaining agreement is that it has jurisdiction over "mixed" groups (see infra, Section D and A.P. pp. 53a, 54a, 73a, n.19).

<sup>&</sup>lt;sup>44</sup>Petitioners' Brief pp. 25, 26, 29, 30, 33, 34. <sup>45</sup>Volkswagenwerk v. FMC, 390 U.S. at 278.

<sup>46</sup> A.P. p. 62a.

<sup>&</sup>lt;sup>47</sup>[T]he actual holding of *Pennington* requires proof of the predatory purpose of the agreement between a union and the employers." Associated Milk Dealers Inc. v. Milk Drivers Local 753, 422 F.2d 546, 553 (7th Cir. 1970).

the Ports were economically weak<sup>48</sup> or that they would suffer disproportionately the burdens of the PMA programs, as was the case in *Pennington*.

Similarly, the Commission relies on Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965), as justification for its jurisdiction over some collective bargaining agreements. The Court's determination in Jewel Tea that the exclusive jurisdiction of the NLRB over collective bargaining did not deprive the federal courts of jurisdiction over the agreements resulting therefrom is seized upon by the Commission as justification for its asserted concurrent jurisdiction with the federal courts (A.P. p. 49a-51a). This leap would be justifiable at best only if the Commission had the comprehensive experience in administering labor policies that the federal courts have.

Respondent here will not attempt to "distill" or "reflect" (Petitioners' Brief p. 38) the labor/antitrust decisions of the Court, but "the Court has not imposed antitrust liability on every 'conspiracy', since such a rule would have subjected multi-employer bargaining units, most-favored-nation clauses, and pattern bargaining to antitrust scrutiny by federal courts." The Court has recently once again carefully

explained that the object of the labor exemption is not to prevent the elimination of wage competition—perhaps the primary purpose of all labor organizations—but to prevent anti-competitive arrangements unrelated to wages and working conditions which have a direct effect on prices and on the "business market." Connell Construction Co. v. Plumbers & Steamfitters Local 3, 421 U.S. 616 at 622-23 (1975).

Supplemental Memorandum No. 4 is concerned with the terms of access to a labor market, not to a business market. Each of its terms is concerned with the conditions of employment; it has nothing to do with the markets of the employers or the prices charged to their customers, except to the extent that an equal improvement in labor standards throughout the industry will make their services generally more expensive. "There is nothing even remotely illegal about such bargaining."

Aiding "non-labor groups to create business monopolies and to control the marketing of goods and services" is not within the labor exemption<sup>54</sup> but there is

<sup>&</sup>lt;sup>48</sup>Indeed the ports have put at least one measure of their economic strength in the record (see App. p. 50). The scale of their investment is sharply distinguishable from the small independent mine owners threatened in *Pennington*.

<sup>40</sup> A.P. p. 50a.

<sup>&</sup>lt;sup>50</sup>See the discussion infra, Section D demonstrating the Commission's lack of labor experience or expertise.

<sup>&</sup>lt;sup>81</sup>Note, The Supreme Court, 1974 Term, 89 Harv. L. Rev. 241 (1975).

or See in this regard Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965). See also Apex Hosiery Co. v. Leader, 310 U.S. 469 at 503-4 (1940), the "elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."

Tea, (381 U.S. at 726). See also Associated Milk Dealers v. Milk Drivers Local 753, 422 F.2d 546 (7th Cir. 1970); Dolly Madison Industries, Inc. and Teamsters Local 592, 182 N.L.R.B. 1037 (1970).

<sup>54381</sup> U.S. at 737 (Douglas, J., dissenting).

no such activity in this case. There is no finding of an attempt by the ILWU to help rig the business market to achieve indirectly improved benefits; rather its has been a consistent attempt to raise the laboring standard by an insistence on increased benefits throughout the bargaining unit. Hence, the situation, even as analyzed by the Commission, is similar to that in Jewel Tea. The Ports complain only of the union's asking them to provide the same benefits upon the same conditions as those agreed to by the multi-employer bargaining unit if they use the facilities created by the union in that bargaining unit.<sup>55</sup>

In Jewel Tea the restriction on marketing hours were found to be a mandatory subject of bargaining, leading the Court to hold that an agreement on such subjects between the union and the employees in a bargaining unit is not illegal under the Sherman Act, nor was the Union's unilateral demand for the same contract of other employers in the industry" (White, J., 381 U.S. at 691). Thus, since the Commission was wrong in its first conclusion that Supplemental Memorandum No. 4 was a non-mandatory subject of bargaining (supra, Sections IV and V), and, given that it made no finding of predatory intent, petitioners' argument that the memorandum was not labor-exempt dissolves.

Yet even if the Memorandum were a non-mandatory item of bargaining there is still not sufficient anti-

trust-let alone Shipping Act-concern to overbalance the clear labor policy of eliminating wage competition by means of pattern bargaining. In both Pennington and Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797 (1945), there were significant elements absent here-predatory intent and direct actual damage done to the marketplace by enforcement of the agreement. This Court has yet to find predatory intent simply based upon agreements between unions and multi-employer bargaining units which have competitive effects on third parties, and there is no other basis for any such finding in this case. Nor is there any intent here to drive anyone out of business or to push small operators "to the wall." The only characterization of the respondents' intent made by the Commission is an intent to push the ports into a multi-employer unit on the same terms as others.

The Commission failed to understand that "collective bargaining inevitably involves and requires discussion of the impact of the wage agreement reached with a particular employer or group of employers upon competing employers," and that the effect of its decision "to bar a basic element of collective bargaining from the conference room," will be to substitute unilateral force for rational discussion. (Jewel Tea, 381 U.S. at 714, Goldberg, J., concurring).

The policy interests of the ILWU are reflected in Supplemental Memorandum No. 4. That the memorandum also reflects some of PMA's interests is inevitable if good faith bargaining is engaged in. Just such a coincidence of interests was evidenced below.

<sup>&</sup>lt;sup>88</sup>See 381 U.S. at 688 (White, J. citing the district court opinion).

<sup>34</sup>See 381 U.S. at 691 (White, J.).

The union's position in negotiations was that the PMA benefits be made available to all employees no matter for whom they worked, whether members of PMA or not. PMA, on the other hand, wanted no further participation in its programs by nonmembers who did not assume full responsibility for maintenance of the registered work force.

Given the difficulty of applying the labor exemption to any particular set of facts, it hardly seems likely that the Commission has isolated the essential elements of the case law." The court of appeals was diplomatic when it cautioned the Commission against "parsing the [Supreme] Court decisions in this highly complex area." The court of appeals noted the very real danger that such oversimplification would "create a legal conundrum in which the total labor/antitrust exemption is still greater than the sum of [the Commission's] parts" (A.P. p. 40a.

It is understandable that an agency without labor expertise would misinterpret this Court's shorthand term "labor exemption." As used by the Commission the word "exemption" is a misnomer, for it implies that the antitrust laws apply generally and the labor laws only intersticially when in fact the "exemption" is the line of demarcation between two equally honored national policies. By misusing the term "exemption" the Commission begs the difficult question of

which policy and statute predominates in any given case. Labor interests were never intended to be reached by the antitrust statutes, and when the issue arose the labor movement received the Clayton Act. Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Hunt v. Crumboch, 325 U.S. 821(1945); Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797 (1945).

This Court has made it unmistakably clear that reconciling the conflicting demands of the various statutory schemes is the responsibility of the federal courts, on to f any administrative agency; certainly not of the FMC. Its most recent decision in this area reaffirms the unique qualifications of the federal courts in lieu of executive agencies to perform this function (Connell, supra).

## D. The FMC Is Not the Proper Forum to Weigh Collective Bargaining Agreements

The line drawn in Volkswagenwerk must remain clear and distinct in the face of attempts by the Commission to expand its jurisdiction so as to include some collective bargaining agreements, for the pre-implementation procedures of the Shipping Act cannot be reconciled with the national labor policy of free collective bargaining. The Commission does not appreciate the significance of pre-implementation scrutiny of a collective bargaining agreement. Indeed, petitioners argue here that respondents should be pleased to be immunized against the application of the

has been inconclusive. See Meltzer, supra, 32 U. Chi. L. Rev. 659 (1965); Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955); St. Antoine, Connell: Antitrust Laws at the Expense of Labor Law, 62 U. Va. L. Rev. 603 (1976).

<sup>&</sup>lt;sup>58</sup>Allen Bradley, 325 U.S. at 806: "The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile."

antitrust laws as provided for by the Shipping Act for Commission-approved agreements.<sup>59</sup> The promised benefit is illusory as far as unions are concerned.

What would be the final irony, were it not so serious a threat, of this attempt by the Commission to bootstrap its way into labor relations is that, if the FMC is held to have the jurisdiction to exempt collective bargaining agreements from the antitrust laws, it can only inure to the benefit of employers. It will afford no protection to the unions who are not persons subject to the Act and who will remain vulnerable to antitrust attack. No one has ever held that unions are persons subject to the Shipping Act. The Commission has conceded this but believes that it has jurisdiction over "mixed" agreements, i.e., where one of the parties to an agreement is subject to the Act (see Boston Shipping, 16 F.M.C. at 10; New York Shipping, 16 F.M.C. at 389). Yet that jurisdiction has only been successfully invoked where the agreement was found to run between persons either expressly subject to the Act or closely allied to it, e.g., terminal operators. New York Shipping Association v. Federal Maritime Commission, 495 F.2d 1215 (2d Cir. 1974), cert. denied 419 U.S. 964 (see A.P. 52a-56a, 73a). This anomalous result of the Commission's extension of de facto jurisdiction must be an intolerable result to organized labor. Nevertheless petitioners suggest that the ILWU should see this one-sided exemption as desirable (Petitioners' Brief p. 29).

It seems obvious that what the Ports are seeking to protect is some real or imagined competitive advantage in dealing with the ILWU outside of PMA while utilizing PMA's fringe benefit resources. In short, the Ports see in this action potential protection for wage competition in fringe benefits. In this context it is not uninteresting to the ILWU that the Commission claims to see a shipping concern even though they do not include a single shipping element in their "balance" of national policies. It is apparent that the Commission believes that the encouragement of wage competition is still the rule of the land and that it supports the Ports' efforts to promote it. We submit that the FMC evaluation,

to quote Mr. Justice Holmes, "really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit . . . and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue." [Holmes, Privilege, Malice and Intent, 8 Harv. L. Rev. 1, 8 (1898); in Frankfurter and Greene, The Labor Injunction (1930) p. 26.]

Petitioners disregard the fact that the entire basis of the labor laws in this country is that the organized power of the corporation must be met with the strength of collective action. The ruling by the Commission, "would make nearly impossible the maintenance or prompt restoration of industrial peace" (A.P. p. 28a).

<sup>59</sup>Petitioners' Brief, p. 29.

<sup>\*\*</sup>A collective bargaining agreement is the product of negotiations. How can negotiators sitting at a table arrive at an

Moreover, the performance of the Commission in the arena of maritime labor relations provides no assurance that it could maintain or promptly restore industrial peace. In its first exercise of jurisdiction in this area, United Stevedoring Corp. v. Boston Shipping Association, 15 F.M.C. 33 (1971), on remand from the First Circuit Court of Appeals, 16 F.M.C. 7 (1972), the Commission failed to recognize that a maritime union has a continuing interest in the allocation of work and that contract provisions pertaining thereto do not constitute "the type of agreement requiring Commission approval under section 15."11 The Court of Appeals for the First Circuit, however, recognized at once that the intrusion into, and possible conflict with, labor activities and the jurisdiction of the NLRB is more than theoretical. The court of appeals saw that the seven-month delay, which was necessary to take the Boston Shipping decision to the court of appeals, was already far too lengthy in the labor law context and it insisted that the Commission complete its new report within ninety days. The delay that concerned the court in Boston Shipping pales

agreement if they know that a major part of it depends on the approval of the Federal Maritime Commission! How many months—or years—will it take to get approval! What will happen meanwhile! Will not the imposition of that kind of administrative supervision bring an end to, or at least partially paralyze, collective bargaining!" [Volkswagenwerk v. FMC, 390 U.S. at 310 (Douglas, J., dissenting.)]

4115 F.M.C. 33, 44-45 Compare the conclusion of Hearing

Counsel herein that:
there are so many factors which relate to antitrust and labor
laws and policies rather than the Shipping Act that the
Commission ought to leave these matters to the courts and
the NLRB who are equipped to cope with them. [App. pp.
143-44.]

into insignificance when set against the five-year delay already accumulated in this case.

Petitioners protest the lack of "empirical data" to support what they assert was the court of appeals "exaggerated" analysis of the impact of delay upon collective bargaining,42 implying that times have changed and that agreements are no longer "worked out in eleventh-hour bargaining sessions, or, as in this case, in hard-fought negotiations following a strike and mediation." If the petitioners need "empirical data" they need only examine the history of labor relations on the West Coast. The reality of collective bargaining, despite petitioners' attempts to explain it away, has not changed in the least. The very agreement over which the Commission has asserted jurisdiction followed a three-month strike which was resolved, ultimately, only by the intervention of a labor mediator (App. pp. 87-89).

The Commission's reconsideration of Boston Shipping following remand does not suggest a developing labor expertise. In a remarkably short time the Commission fashioned from the decisions of this Court a four-pronged test by which it would in the future determine whether a labor agreement was within its jurisdiction." Without apparent recognition of the fact that Congress long ago determined that questions

esPetitioners' Brief, pp. 28, 29.

<sup>&</sup>lt;sup>63</sup>Petitioners' Brief, p. 27.

The Commission was given 90 days in which to reconsider. It should be noted that the four-pronged test is obiter dicta, since the FMC concluded that it did not have jurisdiction in Boston Shipping.

pertaining to good faith bargaining, mandatory subjects of bargaining, and the scope of a bargaining unit require the expertise of the NLRB with only limited review in the courts," the FMC made its jurisdiction dependent on how it answered just these questions. Further, it reached the surprising conclusion that failure to meet any one requirement of its fourpronged test of jurisdiction required that it assume jurisdiction, notwithstanding this Court's repeated warnings to the federal courts that the accommodation of equally important federal policies requires sensitive evaluation and weighing of many factors.60

In this case, the Commission demonstrates its inadequacy as a labor tribunal in two significant ways. First, it attempts to dispose of the question of what may or may not be a mandatory subject of bargaining without any apparent recognition that this is one of the most troublesome areas of labor law for the NLRB which has primary jurisdiction to make such determinations. The Commission does not appreciate that Supplemental Memorandum No. 4 dealt with fringe benefits and access to a work force-wellestablished subjects of bargaining.

Then the Commission asserts that it is "possible" that the ILWU "may" commit a series of acts, each of which may be an unfair labor practice under the Labor Management Relations Act (A.P. p. 70a). The Commission apparently does not realize that any act by a union to coerce an employer into joining a multiemployer unit is arguably a violation of the express language of section 8(b)(4)(ii)A of the NLRA. Nor does the Commission appreciate that other hypothetical acts by the ILWU would arguably violate at least four other sections of the Act (A.P. pp. 70a-71a), and, if not, would constitute protected activity under section 7 thereof.

First, even if it is true that the union has engaged in or would engage in activities which would force the Ports to join the Pacific Maritime Association, the union would arguably be guilty of a violation of sections 8(b)(4)(ii)A and 8(b)(1)B of the Labor Management Relations Act.

<sup>45</sup> Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

<sup>68</sup> Supra, n.32.

<sup>41</sup> National Labor Relations Board v. Truck Drivers Local 449, 353 U.S. 87 (1959); National Labor Relations Board v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958); Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959); Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203 (1964); Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); National Woodwork Manufacturers Association v. National Labor Relations Board, 386 U.S. 612 (1967); Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

<sup>\*</sup>See, e.g., ILWU Locals 8 & 92 and General Ore, Inc., 126 N.L.R.B. 172 (1960).

<sup>&</sup>lt;sup>69</sup>It shall be an unfair labor practice for a labor organization or its agents . . . (ii) to threaten, coerce, or restrain any person ... where ... an object thereof is: (A) forcing or requiring any employer or self-employed person to join any . . . employer organization.

<sup>&</sup>lt;sup>70</sup>It shall be unfair labor practice for a labor organization or its agents to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining.

<sup>&</sup>quot;Both the language and the legislative history of § 8(b) (1) B reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities; namely, collective bargaining and the adjustment of grievances. By its terms, the statute proscribes only union restraint or coercion of an employer in the selection of his representatives for the purposes of collective bargaining or

Second, if the union denied to nonmember employers personnel from the joint dispatching hall, it would arguably be in violation of Sections 8(b)(4)(i)A,<sup>n</sup> as well as Section 8(b)(1). ILWU Locals 8 & 92 and General Ore, Inc., 126 N.L.R.B. 172 (1960).

Third, if the union refused to work alongside nonunion personnel whom it did not seek to represent, it would arguably be in violation of Section 8(b)(4)(i, ii)D, as well as 8(b)(1)B and 8(b)(4)A."

Fourth, if the union put up, or threatened to put up, picket lines at the entrances to the Ports' terminals and thus stopped the movement of all cargo being delivered to or taken from such terminals by other

the adjustment of grievances', and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment." Florida P & L v. Elec. Workers Local 641, 417 U.S. 790 at 803 (1974).

It shall be an unfair labor practice for a labor organization or its agents . . . to engage in, or to induce or encourage any individual employed by any person . . . to engage in a strike or a refusal in the course of his employment to . . . perform any services . . . where . . . an object thereof is: forcing or requiring any employer . . . to join any . . . employer organization . . . .

tion . . . to engage in, or to induce or encourage any individual employed by any person . . . in a strike or a refusal . . . to perform any services; or to threaten, coerce or restrain any person . . . where in either case an object thereof is . . . forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization, or in another trade, craft or class.

See Harnischfeger Corp. v. Sheet Metal Workers Local 94, 436

See Harnischfeger Corp. v. Sheet Metal Workers Local 34, 436 F.2d 351 (6th Cir. 1970); NLRB v. Operating Engineers Local 825, 400 U.S. 297 (1971); NLRB v. Plasterers Local 79, 404 U.S. 116 (1971); NLRB v. Elec. Workers Local 3, 542 F.2d 860 (2d Cir. 1976); Glass Workers Local 1892, 141 N.L.R.B. 106 (1963); ILWU Local 8 et al. and General Ore, Inc., 128 NLRB 351 (1960).

union personnel, it would arguably be in violation of section 8(b)(3)."

The ILWU denies that it has been or would be guilty of the illegal acts hypothesized by the Commission. Yet even if these acts occurred, the NLRB, and not the Commission, is the proper agency to determine whether they were illegal and, if so, the appropriate remedy for the protection of injured persons."

In the last analysis the Commission does not appreciate that good faith industry-wide collective bargaining necessarily involves a consideration of the interests of parties outside the immediate bargaining unit. It was not illegal for the ILWU to bargain for industry fringe benefits for dockworkers employed by nonmembers. It was not illegal for PMA to be concerned about the terms on which nonmembers participated in its facilities and programs. Since nonmembers have in the past actually participated in the programs, any change in terms must be the result of bargaining. Any unilateral change in the conditions of bargaining, would be a breach of the duty to bargain in good faith. Hence, had PMA remained si-

<sup>&</sup>lt;sup>78</sup>It shall be an unfair labor practice for a labor organization . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees.

See NLRB v. Laborers Local 264, 529 F.2d 778 (8th Cir. 1976); Painters Dist. Council No. 36, AFL-CIO, 155 N.L.R.B. 1013 (1965).

<sup>&</sup>lt;sup>14</sup>Garner v. Teamsters Local 776, 346 U.S. 485 (1953); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

<sup>&</sup>lt;sup>75</sup>Sections 8(a) and Sections 8(d) of the NLRA; Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Katz, 369 U.S. 736 (1962); H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970); General Electric Co. v. N.L.R.B., 412 F.2d 512

lent as to its policy decision to alter the terms upon which nonmembers would be permitted to use the PMA-administered program," while bargaining with the ILWU over the terms of the 1972 Agreement, it would have been guilty of an unfair labor practice." NLRB v. Katz, 369 U.S. 736 (1962).

Nor does the Commission appear to appreciate that the Labor Management Relations Act also requires good faith bargaining between ILWU and the Ports. The union arguably could not adamantly insist that nonmembers adopt the PMA agreement without violating Section 8(d) of the National Labor Relations Act. Further, if it bargained to an impasse on what the Ports allege to be a non-mandatory item of bargaining, the union would also arguably be in breach of the duty to bargain in good faith (sections 8(b)(3) and 8(d))." The Ports, should events come to pass as prophesied by the FMC, have an adequate regulatory remedy specifically fashioned by Congress to deal with precisely the situations the Commission

(2d Cir. 1969); an employer's motives will be analyzed in the totality of the circumstances. See NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953), cert. denied, 346 U.S. 887 (1953), and generally Universal Camera Corp. v. NLRB, supra. 78PMA had determined well before the 1972 negotiations began

to alter the terms upon which nonmember participants would be allowed to use the benefit institutions (See App. pp. 104-05).

<sup>11</sup>See NLRB v. Laborers Local 264, 529 F.2d 778 (8th Cir. 1976).

<sup>18</sup>Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Katz, 369 U.S. 736 (1962); H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). By the same token, had the strike during which bargaining took place in 1972 been found to be an attempt to insist upon a non-mandatory item the union would arguably have been guilty of an unfair labor practice. NLRB v. Borg-Warner Corp., 356 U.S. 342.

describes to be within the intent of the language of section 15.

The Commission has attemped an impossible task. It simply is not reasonable to expect an executive regulatory agency to balance the goals of three separate statutory schemes when it has expertise in only one. Yet such a balancing act is precisely what is required of the FMC if its view of its jurisdiction is endorsed by this Court.

## VIII. CONCLUSION

The holding of this Court that section 15 does not reach collective bargaining agreements and the warning of two courts of appeals that the exercise of pre-implementation scrutiny of collective bargaining agreements by the Federal Maritime Commission would confound the national labor relations policy should go unheeded no longer. Respondents respectfully submit that this Court cannot condone the Commission's assertion of jurisdiction over Supplemental Memorandum No. 4. The court of appeals decision should be affirmed.

Dated, San Francisco, California, September 20, 1977.

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# In the Supreme Court of the HICHAEL RODAK, JR., CLEI United States

OCTOBER TERM, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners

V

Pacific Maritime Association, International Longshoremen's and Warehousemen's Union, et al.

Respondents.

On Writ of Certioreri to the United States Court of Appeals in the District of Columbia Circuit

## **Brief for Respondent Pacific Maritime Association**

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# In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners

٧.

Pacific Maritime Association, International Longshoremen's and Warehousemen's Union, et al.

Respondents.

On Writ of Cortiorari to the United States Court of Appeals in the District of Columbia Circuit

## **Brief for Respondent Pacific Maritime Association**

### QUESTIONS PRESENTED

1. Whether jurisdiction to resolve contentions that a multi-employer maritime collective bargaining agreement forfeits the labor exemption from the antitrust laws lies in the Federal Maritime Commission under section 15 of the Shipping Act, rather than in federal district courts under the antitrust laws.

2. Whether, assuming that the Commission is the proper forum to resolve challenges to labor agreements, the Commission erred when, without a finding that the terms had a significant adverse impact on competition in the market-place and without a finding of a union-management agreement for the union to impose the terms on outside employers, it denied a labor exemption to collective bargaining provisions setting forth rights and corresponding employer obligations concerning participation in industry-wide fringe benefit programs.

### COUNTER STATEMENT OF THE CASE

### 1. The Parties and the Contentions Below.

This case concerns certain "nonmember" provisions of the Pacific Coast Longshore and Clerks' Agreement ("PCLCA"), the master West Coast, industry-wide collective bargaining contract between Pacific Maritime Association ("PMA") and International Longshoremen's and Warehousemen's Union ("ILWU"). The nonmember provisions eliminated PMA's right to withhold consent for non-PMA employers wishing to utilize a shared ILWU-PMA registered work force to participate in ILWU-PMA multi-employer fringe benefit plans. The terms provided greater equality of benefits and burdens, as between PMA and nonmember employers, arising from use of the ILWU-PMA registered work force, than had prevailed under past "nonmember" agreements (Appendix [hereinafter "App."] 291-93; see App. 207-11).

The nonmember provisions were challenged in federal district court under the antitrust laws and before the Commission under the Shipping Act, 1916 (46 U.S.C. § 801 et

seq.) by certain public ports¹ who are not members of PMA. The ports, who employ dockworkers in certain marine terminal operations, bargain separately with ILWU. Pursuant thereto, they have shared in rotational employment of the ILWU-PMA registered work force and, with PMA's consent, have participated in the ILWU-PMA multi-employer fringe benefit plans created for this work force.

The nonmember ports contended that the provisions forfeited the labor exemption from the antitrust laws and thereby forfeited a like exemption from section 15 of the Shipping Act (46 U.S.C. § 814) (Appendix to Petition for Certiorari [hereinafter "A.P."] 2a, 46a-47a). Section 15 requires pre-implementation approval of steamship rate conferences and similar anti-competitive agreements, and Commission approval confers an antitrust exemption. Although the ports did not assert that they had attempted to bargain with ILWU for a separate qualified work force, they contended that they had no practical alternative to using the ILWU-PMA registered work force because existing non-registered dockworkers represented by ILWU lacked adequate skills (A.P. 71a, n.18; App. 186-87). Since acceptance of the nonmember provisions was admittedly a condition of using the ILWU-PMA registered work force, the ports objected that the nonmember terms were, as a practical matter, imposed on them and that they were thereby compelled to align themselves with PMA labor policy (see A.P. 36a, 59a).

The extent to which the nonmember ports may be in competition with PMA members and the extent to which acceptance of the provisions might affect the business of

<sup>1.</sup> The nonmember ports have not participated in the proceedings before this Court. The Port of Seattle has not participated in the case since submitting a memorandum to the Commission on March 28, 1974.

PMA members, is not of record and not the subject of findings.<sup>2</sup> If the nonmembers declined to accept the terms, however, they would be unable to use the ILWU-PMA registered work force with consequences which the Commission found would have a negative impact on shipping and competition (A.P. 70a-71a).

In addition to the nonmember ports there are nonmember employers, not parties to this proceeding, who compete with some PMA members and who utilize the ILWU-PMA registered work force. PMA members were concerned that these nonmember stevedores—not the nonmember ports who rarely perform stevedoring—were obtaining an advantage by using the registered work force on more favorable terms than PMA members (App. 90-91, 95-97, 102). As these nonmember stevedores did not challenge the terms or participate in the proceedings, there are no findings or evidence evaluating any competitive effects of the terms upon them.

### The Bargaining History of the Nonmember Provisions.

The nonmember provisions of the PCLCA are rooted in the history of the labor relations of the industry they concern. A 1934 arbitration award of a presidential National Longshoremen's Board (set forth in Appendix A hereto), settled the bitter 1934 West Coast longshore strike and the San Francisco general strike by decasualizing longshore labor on the West Coast and creating the present ILWU-PMA jointly registered work force. PMA employers' (not nonmember employers) were required to hire exclusively from dispatch halls jointly financed by PMA and the union and to give first preference in dispatch to a delimited pool of longshoremen admitted to registration lists by joint PMA/union action.

Registered dockworkers work for different employers on different days, depending on assignment of workers to particular jobs from ILWU-PMA dispatch halls (App. 89, 290). Rotational employment requires central administration, accounting and record keeping, since registered workers, as a result of collective bargaining, receive a single paycheck from PMA, for which PMA is reimbursed by its members (App. 89, 92-93, 121, 122). The registered work force are beneficiaries of multi-employer fringe benefit plans negotiated between and jointly administered by ILWU and PMA. The plans, which constitute a large portion of a registered dockworker's income, create significant administrative problems (App. 89, 90). They require central record keeping to determine which men over their entire working lives are accruing which benefits and which em-

<sup>2.</sup> There was no evidence or finding that PMA has port members or otherwise represents ports which compete with the nonmember ports here. Some of PMA's members may be competitors or potential competitors for certain marine terminal work performed by the ports, but there was no evidence or finding assessing the nature of that competition, if any, or how or to what degree it might be affected by acceptance of the nonmember terms. The evidence and contentions of the ports focused on effects upon them if they refused to accept the nonmember terms (App. 51-61, 69, 70, 189-92). As the Government points out (Gov't Br. 5), voting control of PMA, which negotiates with offshore unions, is in the carrier members of PMA. There are no findings here of any competitive relationship between the nonmember ports and carrier members of PMA and it is believed that there is no such relationship.

<sup>3.</sup> The parties to the award were PMA's and ILWU's prede-

<sup>4.</sup> For a history of these developments see M. Keller, Decasualization of Longshore Work in San Francisco (W.P.A. Report No. 1-2, 1939), 10-14, 25-50, 122-27 [hereinafter "Keller"]; Larrowe, Shape-Up and Hiring Hall: A Comparison of Hiring Methods and Labor Relations on the New York and Seattle Waterfronts (Univ. of Calif. 1955), 96-104, 139-83 [hereinafter "Larrowe"]. Keller states that the union exercises primary control over admission to registration (Keller, supra, at 28; Larrowe, supra, at 167).

ployers are accruing concomitant man-hour or tonnage assessment liabilities. They require policing to be sure employer obligations are accurately reported and promptly paid.

Since nonmembers offer additional work opportunities it is in the interest of registered dockworkers, assuming substantially similar wages and terms and conditions of employment, to be able to avail themselves thereof. It is also in their interest to receive "credit" under the ILWU-PMA plans and a single PMA paycheck based on time worked for nonmember employers (App. 92-93, 103, 157).

Development of the ILWU-PMA fringe programs for the registered work force led ILWU and nonmembers employing this work force to negotiate participation in some or all5 of the ILWU-PMA plans, subject to PMA's consent granted in nonmember participation agreements which the present provisions amend (App. 77, 91). Such participation was on terms which PMA came to view as allowing nonmembers, particularly stevedores not parties hereto, to participate in the ILWU-PMA plans on terms less onerous than for members (A.P. 55a-56a, App. 90-92, 95-97, 102). In 1970 PMA's Board resolved to withdraw PMA's consent to participation of nonmembers in the ILWU-PMA fringe plans, giving the nonmember employers the option of setting up their own plans or other arrangements pursuant to negotiations with ILWU or joining PMA under its open membership policy and thereby continuing with the ILWU-PMA plans (App. 104-05).

As the Government recognizes, the collective bargaining history respecting nonmember participation in the plans precluded PMA from terminating nonmember participation without bargaining with ILWU (Brief for the Federal Maritime Commission and the United States [hereinafter "Gov't Br."] 9; App. 98, 101, 122-23). The bargaining on the issue opened with the parties at opposite extremes. ILWU asked not only continuance of the prior terms for nonmember participation in the plans, but demanded for the future that PMA accept nonmember participation in all the plans as a matter of right. The opening ILWU bargaining demand of November 16, 1970, read:

"XVI. Fringe Benefits Contributions
"The contract to provide that PMA will accept all
fringe benefit contributions from any employer whether
or not such employer is a member of the PMA." [App.
88, 98 (emphasis supplied).]

PMA's counter demand of December 7, 1970, consistently with its Board's resolution, demanded elimination of non-member participation in the plans (App. 88).

After a long strike based on other issues, the parties were unable to resolve their differences as to nonmember participation and submitted the issue to the Pacific Coast Arbitrator (App. 87, 99-100). Pursuant to his suggestions, they exchanged drafts and on April 15, 1972 reached a compromise (App. 100-02). During the course of the Commission's proceedings herein, further collective bargaining during 1973 resulted in a revised PCLCA which included amended nonmember provisions intended to eliminate the principal objections of the nonmember ports (App. 202-05).

Each of the nonmember provisions reflects an extensive bargaining history and direct ILWU and PMA interests. A delimited registered work force dispatched from the joint dispatch halls, together with control over admission to the

The nonmember ports here have participated in all the PMA plans (App. 121, 188).

work force and NLRB certification of the bargaining unit, is a principal source of ILWU's power because admission to registration means preferential employment, employment security and substantial benefits under the ILWU-PMA plans (see Keller, supra, at 25). If the registered work force is too large there will be inadequate work for its members. Similarly, controls on registration determine the size and quality of the work force the employer will have available. If the work force is too small it will be inadequate for peak periods. If it is too large, the massive long-term obligations under the ILWU-PMA plans would become a crippling burden to PMA members who are jointly and severally liable for obligations payable over the life of the plans.

Accordingly, Clause 2 of the nonmember provisions requires nonmember employers wishing to utilize the ILWU-PMA jointly registered work force to conform to the principles first enunciated in the 1934 award and provides:

"2. The nonmember participant's separate ILWU contract must conform with the provisions hereof [e.g., with the Nonmember Participation Agreement itself], and the provisions of the PCLCA governing the selection of men for inclusion in the joint work force." [App. 291 (emphasis supplied).]

Through joint control of dispatching to particular jobs, ILWU has implemented its concept of "industrial democracy with one type of citizen" founded on "equitable work assignments" (Waterfront Employers Ass'n, 26 War Lab. Bd. Rep. 514, 538-40 (1945)), namely an equitable allocation of soft jobs, overtime, dirty and dangerous jobs and income equality. These issues involve philosophical roots which the War Labor Board found "strike deep" (id. at 538). Similarly, PMA, during times of labor shortage, has long operated a gang allocation system under which the delimited work force is allocated among various employers.

Clause 3 of the nonmember provisions reflects these concerns and provides in part:

"3. A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA. For example a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA." [App. 291.]

A closely related historical concern is ILWU's opposition to and the employers' continuing desire for "steady" gangs. The success of the union's first organizing campaign was based in significant part on promises to eliminate steady

<sup>6.</sup> Shipowners Ass'n of the Pacific Coast, 7 N.L.R.B. 1002 (1938), petition to review denied sub nom. American Federation of Labor v. NLRB, 103 F.2d 933 (D.C. Cir. 1939), aff'd. 308 U.S. 401, (1940). The NLRB certified the ILWU as the exclusive bargaining agent for and defined the bargaining unit as "the workers who do long-shore work in the Pacific Coast ports of the United States for the companies which are members of [PMA's predecessor organizations]". (Id. at 1041 [emphasis supplied].) Non-member employers, who share these same PMA employees, are not members of the employers' association but, by employing the very "workers who do longshore work . . . for [PMA members]" they fall within the bargaining unit as certified by the NLRB.

<sup>7.</sup> As Larrowe points out, "The security of a union as an institution is directly linked to its ability to control the jobs within its jurisdiction. . . . The test, then, of the hiring hall as far as the ILWU is concerned, is its effect on the union's ability to control the jobs on the waterfront." (at 174-75 [emphasis supplied].) Jobs are rotated by ILWU through the dispatch hall to achieve "equalization of earnings" among registered dockworkers (Larrowe at 143), and ILWU control allows it to "expand the worker's productive years by consciously reserving the easier jobs for older men and for men who have been injured." (Larrowe at 170; see id at 144.)

gangs, which longshoremen associated with speed-ups. The War Labor Board in 1946 found steady gangs to be a fundamental issue for ILWU and recommended denial of the employers' demand for "restoration of steady gangs" (Waterfront Employers Ass'n, supra, 26 War Lab. Bd. Rep. at 537-38, 565).

These historical concerns are relevant to clause 5 of the nonmember provisions, which clause provides that nonmember employers utilizing the ILWU-PMA jointly registered work force, may

"obtain and employ a man in the joint work force on a steady basis in the same way a member may do so." [App. 291.]

It also provides that steady men working primarily or exclusively for nonmembers and thus largely unavailable to PMA employers will nonetheless participate in the ILWU-PMA Pay Guarantee Plan.

8. Larrowe, supra, at 162. "In 1935, the union insisted that company gangs be eliminated and, since then, both longshoremen and dockworkers have worked for one employer only long enough to complete the particular job for which they are dispatched.

ILWU, like other unions, is jealous of work jurisdiction. (See App. 153-55, 220; Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884 (2d Cir. 1970).) Clause 6 of the Nonmember Agreement App. 292), now moot as a result of an NLRB decision, incorporated portions of the "container freight station supplement" to the PCLCA (App. 239-41) and reflects that ILWU concern. The incorporated provisions were an attempt to preserve ILWU work jurisdiction over off-dock stuffing of marine containers which was being performed increasingly by teamsters.

As the court of appeals noted, "the union in the past" has been able "to whipsaw by striking PMA but continuing to work for nonmembers" (A.P. 4a, App. 95-97). In the case of a shared work force, this meant that normal economic pressure on union members during strike or lockout was diluted to the extent that registered workers continued to be employed by nonmember employers. Nonmember clauses 3(b) and (c)<sup>11</sup> provide that in event of strike or lockout or partial work stoppage, labor will not be dis-

<sup>&</sup>quot;The employers vigorously opposed the elimination of steady gangs. The union conceded that steady gangs would increase efficiency for certain employers and eliminate hiring problems for certain longshoremen, but argued that these very virtues emphasized the countervailing vices of favoritism and inequality of work opportunities: 'Equalization is the fundamental objective of the union, and equilization includes equal requirements of reporting, equal division of the desirable jobs, equal acceptance of unpleasant tasks, equal regularity as well as quantity of employment, and equal sharing of the work when times are bad'." (Larrowe at 159-160.)

<sup>9. &</sup>quot;5. A nonmember participant may obtain and employ a man in the joint work force on a steady basis in the same way a member may do so. When such participant employs a man to work on a steady basis, it shall notify PMA immediately. On request from PMA, each such participant shall furnish to PMA a list of men it is using on a steady basis. Steady men shall participate in the Pay Guarantee Plan in accordance with the rules that are adopted by PMA and ILWU" (App. 291-92).

<sup>10.</sup> The NLRB held that the incorporated provisions of the PCLCA violated the National Labor Relations Act. International Longshoremen's and Warehousemen's Union (California Cartage Co.), 208 N.L.R.B. 994 (1974), enforced without opinion sub nom. International Longshoremen's and Warehousemen's Union v. NLRB, 515 F.2d 1017 (D.C. Cir. 1975).

<sup>11. &</sup>quot;b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, nonmember participants shall not obtain men from the dispatch hall,

<sup>&</sup>quot;c) if during a work stoppage by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch hall for PMA members, such limited dispatch shall be available to nonmember participants.

<sup>&</sup>quot;The essence of b) and c) of this section is the acceptance by non-member participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against non-member participants." (App. 291).

patched from the dispatch hall to nonmember employers utilizing the ILWU-PMA jointly registered work force on any different terms than for PMA employers.

The remaining substantive clauses of the nonmember provisions provide for participation by registered dockworkers and the nonmember employers thereof in the range of multi-employer, ILWU-PMA fringe benefit programs.

Clause 7<sup>12</sup> requires nonmembers choosing to utilize the registered work force to undertake to participate in all the outstanding fringe plans, to make payments at the same rates and the same times as to PMA members, and to be subject to compliance audits as to their reporting of hours worked, tonnage handled, or other basis for calculating employer financial obligations to the plans. Clause 8<sup>18</sup> requires use of the PMA central pay and records system,

and for reimbursement of payrolls paid by PMA to the registered men. This procedure enables registered dockworkers to participate in the industry-wide single paycheck, social security and withholding system applicable when they work for PMA members. Further, as to fringe benefits keyed to hours worked and employer payments based on hours worked, it enables PMA, which is responsible for record keeping, and the ILWU-PMA staff responsible for administrating the fringe plans, to perform their essential functions. Clause 914 requires nonmembers to pay amounts equal to dues and assessments paid by PMA members to support administration costs ranging from negotiation of the plans to general overhead and administration. Clauses 4 and 10 assure payment of nonmember obligations to fringe programs and for payroll if a nonmember ceases to employ the registered work force or becomes delinquent.15

When the PCLCA was renegotiated in 1973, the 1972 nonmember provisions (App. 206-65) were revised (App. 290-93) to alleviate concerns of nonmember employers

"10. If a nonmember participant becomes delinquent under paragraphs 7, 8, or 9 hereof no joint work force workers shall be furnished to the delinquent nonmember" (App. 293).

<sup>12. &</sup>quot;7. The nonmember participant shall participate in the ILWU-PMA Pension Plan, the ILWU-PMA Welfare Plan, the PMA Vacation Plans (longshoremen and elerks, and walking bosses/foremen) and the ILWU-PMA Guarantee Plans (longshoremen and elerks, and walking bosses/foremen) in accordance with the terms applicable to such participation. Such nonmember shall make payments into these Plans at the same rates and at the same times as members of PMA are to make the respective payments. Attached are statements of terms and conditions currently in effect with respect to such participation. Nonmember Participants shall be subject to the same audits as members of PMA" (App. 292).

<sup>13. &</sup>quot;8. The nonmember participant shall use the PMA central pay system and central records office and must sign the standard forms of participation documents for the central records office and central pay system. Amounts due with respect to the central pay and central records system shall be paid to PMA at the time and in the manner prescribed for members of PMA.

<sup>&</sup>quot;Note: The hours for which pay is distributed through the central pay office to any man within the joint work force, with respect to his being used by such nonmember pursuant to the terms hereof, shall be deemed hours of work for a PMA member company for purposes of determining the individual longshoreman's eligibility for vacations, welfare, pensions, pay guarantee, promotion, transfer, advancement in registered status, seniority, and all other aspects of his work history as a member of the joint work force." (App. 292-93).

<sup>14. &</sup>quot;9. Each nonmember participant shall pay to the PMA an amount equal to the dues and assessments on the same basis that a PMA member would pay. Payments shall be made at the same time the member would pay" (App. 293).

<sup>15. &</sup>quot;4. Should any nonmember participant cease to have the right to obtain men through the allocation and dispatching system, such nonmember shall nevertheless continue under a duty to meet all of its obligations based upon its use of the joint work force including accrued obligations for PMA assessments and dues, obligations for retroactive and current assessments for fringe benefits, obligations to meet liabilities under paragraph 10 hereof, and all other obligations with respect to the pay of workers paid through the central pay office during the period of its participation in the use of the joint work force" (App. 291).

(App. 204). A note to clause 3 of the 1972 agreement, which the nonmembers argued required them to "forego favorable local labor contract provisions with resultant higher costs" (Gov't Br. 12), was eliminated in the 1973 revised agreement (compare App. 201-62 with App. 291 and App. 204). Language in clause 9 of the 1972 agreement, which arguably made PMA strike policy applicable after termination of the ILWU-PMA master contract, was eliminated. (Compare App. 263 with App. 293; see App. 205.) 17

### 3. The Commission's Proceedings and Decision.

Although, as the court of appeals found, the nonmember ports' complaint "boils down to an accusation that they are being forced against their wills into a multi-employer unit" (A.P. 37a), 18 the ports did not attempt to bargain with ILWU for a different qualified work force and did not challenge the provisions before the NLRB as compelling membership in an employer organization in a manner prohibited

by section 8(b)(4)(i)(A) of the National Labor Relations Act (29 U.S.C. § 158(b)(4)(i)(A)). Instead, in July of 1972, the ports (1) filed a complaint in federal district court alleging that the "nonmember" provisions of the contract violated the antitrust laws (A.P. 8a-9a, n.11) and forfeited the labor exemption therefrom, and (2) filed a petition for investigation with the Commission alleging that the same provisions required pre-implementation approval under section 15 of the Shipping Act and opposing approval.

The Commission commenced its section 15 challenge to the April 25, 1972 nonmember provisions on September 6, 1972. Its order of investigation addressed not only possible section 15 jurisdiction over these provisions, to which the nonmember ports had objected, but over all or any part of the entire master collective bargaining contract—the PCLCA—most of which had long since been implemented. The Commission thereafter intervened in and obtained a stay of the court antitrust action, pending the Commission's determination of its own jurisdiction (A.P. 51a).

On October 19, 1972, approximately six months after ILWU and PMA had adopted the nonmember provisions, the Commission "severed" for "expeditious determination" (App. 23) the question of its section 15 jurisdiction over the entire PCLCA and further broadened its order of investigation to include the question whether any provisions of the entire PCLCA

<sup>16.</sup> The 1972 agreement read: "Note: If a prospective non-member participant has an agreement with the ILWU which provides for utilization of the joint work force at terms and conditions of employment more favorable to the nonmember than those provided under the PCLCA, including the CFSS, such nonmember must alter that agreement to conform to the PCLCA, including the CFSS, in order to become a nonmember participant" (App. 261-62).

<sup>17.</sup> In addition, ILWU and PMA eliminated language in clause 6 of the 1972 agreement which nonmember port bodies contended was inconsistent with their status as public bodies.

<sup>18. &</sup>quot;Supplemental Memorandum of Understanding No. 4 is challenged not because it will compel discriminatory rates, but because it will allegedly force nonmembers into accepting the same wage, fringe benefit and work stoppage terms as those negotiated by the multi-employer unit" (A.P. 36a; see Gov't Br. 21).

<sup>&</sup>quot;FMC has thus accepted jurisdiction to determine shipping implications of an agreement which perhaps imposes an improper bargaining unit" (A.P. 37a).

<sup>19.</sup> The Commission's order posed the question:

"1. Whether the master collective bargaining contract and the Supplemental Memorandum of Understanding No. 4 entered into by PMA and the ILWU embody any agreements between and among the members of PMA, which agreements are subject to the requirements of Section 15 of the Shipping Act, 1916."

"should, if found subject to the requirements of section 15 of the Shipping Act, 1916, and found not within any labor exemptions, be approved, disapproved, or modified pursuant to that section." [App. 23 (emphasis supplied).]

On January 30, 1975, five months before the 1973 PCLCA expired.20 the Commission held that the nonmember provisions "at issue here" forfeited the labor exemption and hence could not be carried out unless the Commission first approved or modified the provisions under section 15's "public interest" and other standards. However, the section 15 status of the rest of the PCLCA, challenged by the Order of Investigation, was not discussed or directly resolved, except for a sentence which assumed that the balance of the PCLCA, or at least those PCLCA provisions creating "the amount and kind of fringe benefits to be paid," could be implemented (see A.P. 72a).

The Commission first concluded that the nonmember provisions were "factually substantially similar to the assessment agreement" among employers in Volkswagen (A.P. 54a), which had been held to have pass-through and arguably discriminatory effects on rates subject to Commission regulation and were therefore subject to section 15. (Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n. 390 U.S. 261 (1968); see New York Shipping Ass'n v. Federal Maritime Comm'n, 495 F.2d 1215 (2d Cir. 1974), cert. denied, 419 U.S. 964 (1974).) Next, the Commission determined that the nonmember provisions forfeited the labor exemption under four "criteria" previously promulgated by the Commission as a distillation of this Court's labor/ antitrust decisions in Pennington, Jewel Tea and Allen Bradley21 (United Stevedoring Corp. v. Boston Shipping Ass'n, 16 F.M.C. 7 (1972) [hereinafter "Boston II"]).

The Commission's premise was that failure of a collective bargaining agreement to meet any one of its four criteria "is sufficient to consider withholding a labor exemption" (App. 58a). It held that the nonmember provisions of the PCLCA failed to meet two of the criteria because:

"the matter of the Revised Agreement is not a mandatory subject of bargaining." [App. 62a.]

and

"it . . . imposes terms and conditions upon persons outside the bargaining group." [App. 63a.]22

The Commission focused primarily upon the issue of imposition of the terms by stressing "the possible adverse impact" on the nonmember ports if they elected not to accept the terms and to forego use of the ILWU-PMA

"(1) The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are 'arms-length' or 'eyeball to eyeball'.

"(2) The matter is a mandatory subject of bargaining e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

"(3) The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.

"(4) The union is not acting at the behest of or in combination with nonlabor groups, i.e. there is no conspiracy with management" (A.P. 58a).

22. The Commission summarized its holding by stating: "In view of our finding here that the Revised Agreement is not entitled to a labor exemption by virtue of the fact that it imposes terms on parties outside the bargaining unit and is not a subject of mandatory bargaining, we find it unnecessary to resolve the merits of the 'conspiracy' issue" (A.P. 69a [emphasis supplied]).

<sup>20.</sup> The current PCLCA includes the 1973 nonmember provisions.

<sup>21.</sup> United Mine Workers v. Pennington, 381 U.S. 657 (1965); Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797 (1945). The four criteria are

registered work force (A.P. 70a). The Commission noted that "skilled labor can only be gotten from the ILWU [registered] work force" (A.P. 71a, n.18) and that ILWU "would undoubtedly" picket the ports if non-ILWU labor were used. Thus, a failure to accept the nonmember terms "could well result in the closing of . . . [nonmember] facilities . . ." by ILWU action (A.P. 70a).

Consistently with its "criteria," the Commission's decision did not purport to consider or assess competitive or other marketplace effects if the nonmembers accepted the terms and continued to use the ILWU-PMA registered work force. There were no findings that acceptance of the provisions by nonmembers constituted price fixing, market allocation, ruinous predatory terms or any other

"direct restraint on the business market [which] has substantial anticompetitive effects... that would not follow naturally from the elimination of competition over wages and working conditions." [Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 625 (1975).]

The Commission made one reference to effects on non-members of their accepting the terms, based on the premise that the nonmember provisions involved "elimination of all local agreements between nonmembers and the ILWU" (A.P. 67a-68a), a result which the nonmember ports in 1972 had argued flowed from the Note to clause 3 of the 1972 nonmember provisions, but which was eliminated in the 1973 revision (see n.39 and accompanying text, infra). Based on that premise, the Commission concluded that acceptance of the terms "would result in higher costs to ... the nonmember... than to... PMA members" because "differences in methods of operation and locality" were

"ignored" (A.P. 68a),<sup>28</sup> but it did not determine what such costs were and did not find that any PMA member similarly situated would have had different labor costs or that any higher labor costs were intended to or would in fact injure the ports or affect their position vis-a-vis any competitor.

Because the Commission found the terms to have been imposed as a practical matter by the very value of the registered work force and by ILWU's anticipated hostility to alternatives, no PMA-ILWU conspiracy or other agreement by which ILWU undertook to impose the terms was deemed necessary to the decision, and the Commission disavowed any such finding (A.P. 69a). Specifically, the Commission did not find any PMA-ILWU agreement or understanding precluding ILWU from bargaining with non-members for:

(1) creation of a newly constituted qualified work force represented by ILWU;

(2) terms sufficiently attractive to cause skilled or other particularly desirable registered workers to withdraw their registration in favor of direct employment by nonmembers;

(3) any other alternative labor supply, or labor force terms.

Apart from the application of its "criteria," the Commission's balancing of conflicting statutory policies concluded generally that the terms had a "minimal effect on the collective bargaining process" but, in view of the practical consequences believed to follow if the terms were not accepted, they had

"a potentially severe and adverse effect upon competition under the Shipping Act as would justify our

<sup>23.</sup> In a footnote (A.P. 78a, n.16), the Commission cited increased travel time from Seattle for checkers traveling to two ports in the event that local contracts with ILWU were "eliminated," but it did not find that any PMA member at those ports would be treated differently (see App. 56-57).

consideration of its approvability under the standards thereof." [A.P. 70a.]

In reaching its conclusion the Commission rejected the position of its Hearing Counsel and the dissent that the case presented primarily labor and antitrust questions which were outside the Commission's expertise and which should be resolved by the NLRB or the courts (A.P. 49a-51a, 73a-74a).

### 4. The Court of Appeals' Decision.

PMA and ILWU urged on appeal that the Commission's "criteria" and their application were contrary to this Court's labor exemption decisions and further urged as a matter of policy that application of the pre-implementation approval procedures of section 15 was inconsistent with national labor policy. Because "reconciliation of the competing policies and statutory schemes" necessary to apply the labor exemption from the antitrust laws is a difficult and delicate task (A.P. 2a), the court reversed on the second ground, ruling that courts under the antitrust laws, rather than the Commission under section 15 of the Shipping Act, had jurisdiction to determine such challenges to maritime collective bargaining. The court's holding followed this Court's distinction in Volkswagen between labor related, inter-employer agreements affecting regulated ocean rates and the collective bargaining agreement itself. The court questioned but did not reach the Commission's application of this Court's labor exemption decisions to the nonmember provisions (A.P. 40a; see A.P. 3a, n.1) and questioned the Commission's premises that the revised terms eliminated "local" nonmember/ILWU contracts inconsistent with the PCLCA (A.P. 5a, n.5, 36a, n.34) and were not mandatory bargaining subjects (A.P. 3a, n.1, 38a).

Alternatively, the court held that the particular provisions were not subject to section 15, since, unlike Volkswagen and New York Shipping, the terms did not produce discriminatory rates of Shipping Act concern, but only contentions that nonmembers would be compelled to align themselves more closely with PMA as a condition of continuing to employ the ILWU-PMA jointly registered work force. The nonmember provisions accordingly involved primarily labor issues of concern to the NLRB and "at worst... Pennington considerations" for an antitrust court (A.P. 36a-37a).

#### SUMMARY OF ARGUMENT

Whether attacks on maritime collective bargaining contracts for violating legal standards governing competition in the marketplace must be made before courts under the antitrust laws, or before the Commission under the pre-implementation approval requirements of section 15 of the Shipping Act should depend on whether national labor policy is more compatible with antitrust or with Shipping Act procedures. Although section 15 does not explicitly include or exclude collective bargaining agreements, its wording and legislative history demonstrate a Congressional assumption that labor agreements do not fall within section 15.

At heart, this case involves "strong labor considerations" (A.P. 38a) and presents primarily labor issues. The collective bargaining agreement at issue has no Shipping Act nexus apart from the fact that most of the employer parties thereto are persons subject to the Act. Although the Commission recited general conclusions as to Shipping Act effects and analogized the bargaining terms to the purely inter-employer agreement in Volkswagen, the substance of

the terms and the issues here are fundamentally different from Volkswagen. The Commission did not find that the terms here created costs which in turn necessarily altered rates or charges subject to Shipping Act regulation or created discriminatory rates. The attack on the bargaining terms made clear that objections thereto were based on opposition to imposition of the terms, rather than to the substance or the marketplace effects of the terms themselves, and hence amounted to a contention under section S(b)(4)(i)(A) of the National Labor Relations Act (29 U.S.C. § 158(b)(4)(i)(A)) that nonmembers of the employers' association were compelled to align themselves with an employer bargaining unit.

A challenge to collective bargaining provisions, under laws regulating competition in the marketplace, necessarily involves a delicate balancing of national labor and antitrust policy, a function which courts are better equipped to perform than agencies. The Commission attempted this balancing function under this Court's labor/antitrust decisions, rather than under a different Shipping Act test, but the Commission has neither a statutory mandate nor expertise under the labor laws or under the antitrust laws. By contrast, federal district courts are experienced in applying both statutes and in reconciling such competing statutory schemes.

The pre-implementation approval requirements of section 15 are inconsistent with national labor policy and collective bargaining realities, which require prompt implementation of labor bargains to terminate or avoid labor strife. Since any section 15 jurisdiction to approve labor agreements, either temporarily or permanently, must admittedly be based upon a determination that the agreement forfeits the labor exemption, no section 15 approval

permitting implementation of the agreement is possible until this threshold jurisdictional determination is made. The complexity and difficulty of resolving even the threshold jurisdictional issues create intolerable delays and uncertainties for the labor bargain. Further, the power of the Commission to disapprove, modify, interpret and otherwise regulate section 15 agreements found subject to its jurisdiction is inconsistent with national labor policy favoring collective bargaining free from governmental substantive controls and second-guessing.

Alternatively, assuming that the proper analysis here was whether the labor considerations presented by the bargaining provisions outweighed Shipping Act considerations, the court of appeals properly concluded, based on the Commission's own findings, that there was a strong labor nexus and a weak or nonexistent Shipping Act nexus. This determination, based on fundamental questions of law and balancing of competing national policies, is outside the Commission's expertise and is not committed to its discretion.

In any event, the Commission erred as a matter of law in applying this Court's labor/antitrust decisions. It denied a labor exemption without threshold findings or evidence that the terms themselves had significant or adverse effects on competition in the marketplace prohibited by the antitrust laws. The Commission erroneously focused exclusively on whether the employers outside the employer bargaining group had a sufficiently attractive alternative to accepting the terms and on what the union would do if the terms were not accepted. It ignored the fact that the terms themselves were consistent with this Court's decisions under the antitrust laws, requiring that access to certain valuable, shared industry resources be available to

outsiders, but only if the outsiders share equally in the burdens as well as the benefits of the resource. The Commission further erred in its premise that the terms here, providing the basis on which registered dockworkers would get the benefit of ILWU-PMA multi-employer fringe plans on days when they work for other employers, were not mandatory bargaining subjects. Finally, the Commission erred in denying the labor exemption on the basis of an anticipated imposition of terms on other employers by the union without findings or evidence of a conspiracy or other agreement by which the union agreed with competing employers to impose the terms.

#### ARGUMENT

- Section 15 Does Not Shift Jurisdiction to Determine Challenges to Maritime Collective Bargaining as Being Anticompetitive from the Courts to the Federal Maritime Commission.
  - A. Section 15 Not Applicable by Its Terms, by Its Legislative History or by Consistent Administrative Interpretation.

Section 15 and its legislative history<sup>24</sup> make no reference to collective bargaining agreements. As with decisions holding agreements to consolidate or merge ocean carriers to be outside section 15, the issues here cannot be resolved by the bare wording of the statute. (See Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 731-32 (1973); American Mail Line, Inc. v. Federal Maritime Comm'n, 503 F.2d 157 (D.C. Cir.), cert. denied, 419 U.S. 1070 (1974).) Unions are not persons subject to the Shipping Act.

(See 46 U.S.C. § 801.) Since section 15 applies only to agreements or understandings between persons subject to the Act, it is reasonable to suppose that, had Congress wished to include collective bargaining provisions in section 15, the unions who are always parties to such agreements would have been so defined. Although a clear policy of section 15 should not be defeated by mechanically adding a non-Shipping Act person as a party to an agreement otherwise subject to section 15, the fact that a union is by definition always an essential party is a compelling reason not to subject bona fide collective bargaining agreements to section 15, particularly since there are adequate remedies under the antitrust laws which do not involve pre-implementation approval.

In 1938 and 1941, Congress demonstrated its assumption that section 15 was not applicable to maritime collective bargaining agreements. In section 1005 of the Merchant Marine Act of 1936 (52 Stat. 967 (1938)) Congress provided for filing (but not for pre-implementation approval) of maritime collective bargaining agreements with a special Maritime Labor Board independent of the Commission's predecessor agencies then administering both the Shipping Act and the Merchant Marine Act of 1936. A 1941 Report of the House Merchant Marine Committee, which

<sup>24.</sup> The "Alexander Report" (H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914)) which contains the legislative history of the Shipping Act as originally enacted was issued in 1914. The same Congress made the first attempt at a labor exemption (Clayton Act § 6, 15 U.S.C. § 17). The Shipping Act, including section 15, was revised in 1961 and the principal legislative history is set forth in "Index to the Legislative History of the Steamship Conference/Dual Rate Law," S. Doc. No. 100, 87th Cong., 2d Sess. (1962).

<sup>25.</sup> Assertion of the power to delay, to modify or to disapprove the very agreement that it is the union's function to bargain is to assert jurisdiction in any meaningful sense over the union itself. Moreover, if a union's fundamental rights are affected it will intervene formally in the proceeding as ILWU did here, and the Commission will thus routinely assume jurisdiction over the union as a party as well as over the union's agreement.

<sup>26.</sup> The Court recognized in Volkswagen, for example, that through rate agreements between ocean carriers and railroads, who are not regulated under the Shipping Act, were contemplated by the Act to fall within section 15 (see 390 U.S. at 275-76).

had authored the Shipping Act, proposed a two-year extension in the life of the Board and stated that the Board was the

"only Government agency with which copies of all labor agreements are required to be filed." [H.R. Rep. No. 354, 77th Cong. 1st Sess. (1941).]

There is no history or consistent administrative interpretation as to application of section 15 to labor agreements. Most labor/antitrust policy collisions involving the maritime industry have been resolved by federal courts under the antitrust laws or by the NLRB under the labor laws.27 Although since Volkswagen it has taken jurisdiction over purely inter-employer cost allocation agreements, there are only two prior reported cases in which the Commission purported to enter the collective bargaining arena. In one case the Commission assumed section 15 jurisdiction over a Volkswagen-type inter-employer labor cost assessment formula later incorporated into a collective bargaining contract. (New York Shipping Ass'n v. NYSA/ILA Man-Hour/Tonnage Method of Assessment, 16 F.M.C. 381 (1973), aff'd sub nom. New York Shipping Ass'n v. Federal Maritime Comm'n, 495 F.2d 1215 (2d Cir. 1974), cert. denied, 419 U.S. 964 (1974).) In the other, the Commission first assumed section 15 jurisdiction over the articles of incorporation of an employers' bargaining group and over a labor gang allocation system, set forth in a collective tem referred to in clause 3 of the nonmember provisions. (United Stevedoring Corp. v. Boston Shipping Ass'n, 15 F.M.C. 33 (1971) [hereinafter "Boston I"].) After remand by the First Circuit, accompanied by an expression of "astonishment" at the Commission's decision (Boston Shipping Ass'n v. United States, 8 S.R.R. 20,828 (1st Cir. 1972)), the Commission disclaimed section 15 jurisdiction over the same provisions. (See Boston II, supra, 16 F.M.C. 7.)

## B. Volkswagen is inconsistent with the Commission's Decision.

The Government has not urged or defended the Commission's conclusion that the present collective bargaining provisions were "factually substantially similar to the [inter-employer] assessment agreement" held subject to section 15 in Volkswagen (A.P. 54a). Volkswagen had "emphasized" that the decision was not to be construed as applicable to the PMA-ILWU collective bargaining agreement.

"It is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity." [390 U.S. at 278.]

<sup>27.</sup> See Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884 (2d Cir. 1970); Commerce Tankers Corp. v. National Maritime Union, 553 F.2d 793, 803 (2d Cir. 1977); International Longshoremen's Ass'n v. NLRB, 537 F.2d 706 (2d Cir. 1976), cert. denied, 50 L. Ed. 2d 753 (1977); International Longshoremen's and Warehousemen's Union (California Cartage Co.), 208 N.L.R.B. 994 (1974), enforced without opinion sub nom. International Longshoremen's and Warehousemen's Union v. NLRB, 515 F.2d 1017 (D.C. Cir. 1975).

Both Volkswagen and New York Shipping, supra, involved employer assessment formulae found to have direct and seemingly discriminatory pass-through effects on regulated shipping rates (A.P. 35a-36a). By contrast, consistent with the Commission's findings (A.P. 62a, 65a), the court here characterized the present case as boiling down to contentions that nonmember employers were in effect compelled to align themselves with an employer bargaining unit (A.P. 35a-36a). Since the Commission found no inter-employer agreement here which allocated costs and found no pass-through, arguably discriminatory effects on regulated shipping rates, this case involves issues fundamentally different than Volkswagen even apart from the fact that this agreement was collectively bargained.

### C. Delicate Accommodations of Labor and Antitrust Policy Are Intrinsically Best Performed by Courts.

A determination whether collective bargaining provisions forfeit a labor exemption involves indisputably "delicate" problems of "accommodation between federal labor and antitrust policy" (Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra, 421 U.S. at 636), and "complex and significant questions" which have "aptly been called 'a troublesome and unruly issue'." (Commerce Tankers Corp. v. National Maritime Union, supra, 553 F.2d at 803.)

Reconciliation of such competing statutory objectives is a task which federal district courts are best equipped to perform and for which only the courts have the necessary

28. This Court stated in Volkswagen:

A specialized administrative agency, whose job is regulating ocean transportation and which has no labor and very limited antitrust experience, is poorly qualified for this task.

Unlike the Commission, the NLRB has a high degree of expertise in labor matters and explicit statutory jurisdiction to resolve many of the fundamental issues presented by the labor/antitrust cases, yet this Court has consistently determined that, at the point of collision between labor and antitrust policy, it is the courts, not the NLRB, which must resolve these questions. (Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra, 421 U.S. at 626, 633-34; Local 189, Meat Cutters v. Jewel Tea Co., supra, 381 U.S. at 684-88.) Consistently, Connell held that state antitrust statutes are preempted so that the federal courts can resolve the delicate problems presented by applying this Court's "carefully tailored" standards for reconciling labor policy with federal antitrust laws, not by having another forum applying the policies of yet a third statute whose standards or procedures "may represent a totally different balance between labor and antitrust policies" (421 U.S. at 635-36). (See Teamsters Local 24 v. Oliver, 358 U.S. 283, 295 (1959).)

To its credit, both here and in Boston II, the Commission purported to apply criteria which it believed represented the test for a labor exemption from the antitrust laws articulated in the Allen Bradley, Pennington and Jewel Tea cases, not some different Shipping Act policy balancing test.<sup>29</sup> However, in explaining here why the Commission

<sup>&</sup>quot;There is no question that the assessment agreement necessarily affected the cost structures of, and the charges levied by, individual Association members. Most, though not all, of the stevedoring contractors and terminal operators did pass the assessment on... In the case of Terminals, the assessment it had to pay on Volkswagen automobiles was more than twice its profit margin" (390 U.S. at 273; see 390 U.S. at 288 (Harlan, J., concurring)).

<sup>29.</sup> In Boston II, the Commission explicitly described its "criteria" as being "criteria for determining the labor exemption from the antitrust laws and which we herewith adopt. . . ." (emphasis supplied). It identified the criteria as having "evolved" from this Court's labor/antitrust decisions (16 F.M.C. at 12) and so identified them in this case (A.P. 58a).

rather than the courts should determine the labor exemption question if presented in a maritime context, the Government now contends that determination of a labor exemption involves "primarily" a balancing of "labor and Shipping Act interests" in which the Commission merely "take[s] account of" the antitrust laws (Gov't Br. 19, 21, 28, 36, 40, 53 [emphasis supplied]). Once it is assumed that collective bargaining agreements are subject to section 15 approval Shipping Act considerations would be applicable to the approvability question. However, it is unclear what Shipping Act policies or tests, differing from this Court's labor exemption decisions under the antitrust laws, would or should govern whether maritime collective bargaining is within the labor exemption (see Gov't Br. 40).

If there are no differences between the Government's proffered special Shipping Act balancing test and this Court's labor exemption decisions under the antitrust laws, there is no ground for contending that Shipping Act policy requires the Commission rather than the courts to assume jurisdiction to resolve the labor exemption question. On the other hand, if there are differences between this Court's labor exemption decisions and the Government's concept of a Shipping Act balancing test, the shift to a Shipping Act test, under which the Commission performs the balancing, conflicts with Connell. Connell rejected the application of state antitrust law precisely because bringing in a third statutory scheme or a state court forum would frustrate national labor policy and the Court's careful linedrawing. Bringing in the Shipping Act, and with it the Commission, creates significantly worse problems, first because of section 15's pre-implementation approval procedures and second because the Government vigorously contends that the consequence of vesting jurisdiction in the Commission is that the decision becomes a matter of agency discretion which the courts can only review for abuse of discretion (Gov't Br. 21, 25-26, 41).

Unlike federal courts, which "are themselves not without experience" in labor matters (Local 189, Meat Cutters v. Jewel Tea Co., supra, 381 U.S. at 686), the Commission has no expertise in and no statutory jurisdiction over labor matters. (See Morse, Commissioner, dissenting, A.P. 74a, n.21.) It is anomalous for such an agency to pass upon whether subjects are mandatory subjects of bargaining (compare A.P. 59a-62a with A.P. 3a, n.1), whether bargaining was conducted in good faith (A.P. 59a), whether a union is likely to picket or strike to impose terms (A.P. 70a) and whether a union had a legitimate

"interest in obtaining uniform fringe benefits and access for all employees to joint hiring hall accounting procedures..." [A.P. 3a, n.1.]

The Commission's prior venture into the collective bargaining arena in the *Boston* cases, in which it adopted the four brief "criteria" applied here, was a debacle. The case illustrates not some peculiar failing of the Commission but that an agency cannot be expected to resolve difficult policy conflicts between two statutes which it does not administer and with which it is unfamiliar.

In Boston I (15 F.M.C. 33), approximately two years after collective bargaining had been concluded and implemented, the Commission assumed section 15 jurisdiction over bargaining provisions concerning allocation of long-shore gangs and over the formative articles and by-laws of an employers' association. As here, the Commission viewed the bargaining provisions as a private matter among employers and of "little or no concern to the union" (15 F.M.C. at 45; see A.P. 60a). The First Circuit, in remand-

ing, found this conclusion "plainly erroneous" and expressed its "astonishment" at the ruling. (Boston Shipping Ass'n v. United States, supra, 8 S.R.R. at 20,829 n.3, 20,830.) The court quoted with approval the Justice and Labor Departments' warning that

"The process of collective bargaining involves a giveand-take, with one party making a concession on one
subject in return for obtaining a concession on another
subject. It is difficult, if not impossible, for the parties
to make a meaningful judgment as to the kind of
bargain they are negotiating if one or more of the
key provisions on which agreement turns is subject
to invalidation by the Commission. Moreover, the fact
that Commission approval would have to be obtained
before the agreement could be put into effect would
necessarily delay—for the period of the Commission
hearing and decision and possible court review—the
implementation of the agreement; and this delay may,
in turn, cause industrial strife." [8 S.R.R. at 20,831.]

In Boston II (16 F.M.C. 7), the Commission reversed itself, upholding a labor exemption and disclaiming section 15 jurisdiction over bargaining provisions which by then were three years old. It vowed to follow a Justice Department suggestion to initiate a rule-making proceeding to

"exempt for the future this class of agreements from some or all of the requirements of section 15..., thereby not jeopardizing collective bargaining by any threat of pre-approval implementation penalty. This we intend to do." [16 F.M.C. at 15.]

As the dissent here pointed out, no rule-making has so much as been announced (A.P. 74a, n.20).

Boston II is the source of the Commission's distillation of the labor exemption decisions of this Court into four

brief criteria, two of which it purported to apply in the instant case. Although the court of appeals here found it unnecessary to determine whether these criteria accurately reflected this Court's decisions, it did

"caution the Commission, however, that parsing the Court decisions in this highly complex area may over-simplify the balancing process required . . . ." [A.P. 40a.]

It is incorrect to suppose that because the Commission must "consider the antitrust implications of an agreement before approving it" (Federal Maritime Comm'n v. Seatrain Lines, Inc., supra, 411 U.S. at 739) the Commission somehow has appreciably greater qualifications in applying the antitrust laws than it does the labor laws. The Commission's principal mission under section 15 is, with Congress' blessing, to provide antitrust exemptions for steamship rate conferences and to supervise the resulting cartelized rate-making. (See H.R. Rep. No. 498, 87th Cong. 1st Sess. 4-5, 13 (1961).) Under section 15 the Commission takes note of these per se antitrust violations and then proceeds to approve or disapprove such agreements, depending on whether a sufficient "transportation need" is shown to overcome the competitive restraint. (See 41 Fed. Reg. 51623, Rule 522.5(b) (Nov. 23, 1976) (codifying existing procedures); 46 C.F.R. § 522.5; Agreement No. 8760-5, 17 F.M.C. 61 (1973).) This process does not acquaint the Commission with the substance or the subtleties of the antitrust laws or steep it in the economic rationale and policy which the antitrust laws reflect.

The formal basis on which the Government rests its contention that the Commission has jurisdiction to determine labor exemption issues is the assertion that, conceptually, any exemption of collective bargaining agreements from section 15 can only be conferred by the Commission. Under

this view, a labor exemption is not compelled directly by national labor policy, as the court of appeals assumed, but rather depends upon the Commission's duty "to take account of" the antitrust laws in passing on section 15 agreements (Gov't Br. 28, 36). Since only the Commission has section 15 functions, presumably only the Commission can, by taking account of the antitrust laws, also "take account of" the labor exemption concept and therefore bestow a labor exemption from section 15. Correspondingly, the Government argues that the Commission thereby acquires primary jurisdiction to decide the labor exemption issue (Gov't Br. 53-54). However, a labor exemption from statutes governing competition in the marketplace is compelled directly by fundamental national labor policy, not something in the antitrust laws themselves, and the exemption is not something that only the Commission can bestow in giving weight to the antitrust laws as part of the section 15 approval process applied to particular agreements. If there were no antitrust laws to apply, labor policy would still compel the same exemption from section 15 which the court found here.80

The appropriate way to make certain that the labor exemption standards developed by this Court are actually applied, rather than loosely taken "account of" as part of an amalgam of unarticulated Shipping Act standards, is to provide that maritime collective bargaining agreements, like maritime agreements to merge or consolidate, are not subject to section 15 at all. They remain subject to attack before the courts under the antitrust laws to the same extent as labor agreements in all other industries.

# D. Pre-Implementation Approval of Collective Bargaining Agreements Is Inconsistent with Collective Bargaining Realities.

The section 15 pre-implementation approval process is a drastic interference with free collective bargaining and thus is different in kind from the application by the I.C.C. of its service requirements to regulated motor carriers, subjected to "hot cargo" clauses (see Gov't Br. 52-53; compare Local 1976, United Brotherhood of Carpenters v. NLRB, 357 U.S. 93, 108-09 (1958)).

Before the Commission can exercise section 15 jurisdiction over a labor agreement by granting permanent or interim approval, it must first determine that it has jurisdiction. Admittedly, it lacks such jurisdiction over labor agreements unless it determines that the labor exemption applicable to such agreements is forfeited. Accordingly, in any instance in which a collective bargaining agreement is either filed for section 15 approval or challenged before the Commission as requiring approval, the Commission must first perform the difficult, delicate and necessarily time-consuming task of resolving the labor exemption question in a proceeding in which adversary interests have a right to be heard.

Pending resolution of this jurisdictional question either the collective bargaining is frustrated, as in the case of the nonmember provisions, or the parties risk section 15's large penalties by implementing the agreement. Voluntary submission to the Commission's jurisdiction in order to obtain an interim approval is inconsistent with resisting such jurisdiction and of course also risks a disapproval or a Commission-imposed modification of all or part of the bargain. In any event, voluntary submission to Commission jurisdiction to obtain an interim approval and an antitrust exception cannot itself confer subject matter jurisdiction, and the Commission would still have to make the lengthy

<sup>30.</sup> Connell explained that: "The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions" (421 U.S. at 622).

and difficult threshold labor exemption determination (see Gov't Br. 40).

Given the immense national economic consequences that flow from transportation industry labor stoppages, if a labor stoppage exists or is imminent when an agreement comes before the Commission, the section 15 pre-implmentation approval requirement necessarily means decision-making under circumstances ill suited to judicious determination of difficult policy questions. However, where it seems that the union will not make a "walk-out" issue of particular provisions, any sense of urgency is lost, and the parties are denied the benefits of their collective bargaining for years. Either alternative is an extraordinarily poorly conceived way to resolve labor exemption questions and will encourage negotiating parties to believe that the only way to remove an irrational obstacle to resolution of labor disputes is to allow a crisis to develop.

When collective bargaining issues are resolved by the parties, it is axiomatic that the bargain, in its entirety, must be implemented forthwith, so that labor disruption can be immediately terminated. Use of section 15 to resolve labor exemption questions does not fit and cannot be made to fit the realities of collective bargaining, as the court of appeals recognized. With or without "interim" approvals from the Commission, conferred pendente lite after a determination of jurisdiction, the section 15 process is far too slow and uncertain. Here, provisions negotiated in 1972 and revised and reincorporated in successive collective bargaining agreements have yet to be implemented. The remainder of the PCLCA, which had to be implemented despite the Commission's challenge to its section 15 status, has been renegotiated twice during the pendency of the case, yet did not even receive an explicit jurisdictional ruling in the Commission's 1975 decision. The Boston II jurisdictional ruling took three years. In New York Shipping, where the parties finally agreed to an interim approval on the basis of a refund of assessments if the agreement were later disapproved, nearly a year elapsed between placement of the agreement before the Commission and the interim approval. (See New York Shipping Ass'n v. Federal Maritime Commission, supra, 495 F.2d at 1218 and the Commission's decision therein, 16 F.M.C. 381 (1973).)

Nonetheless, the Government urges a lack of "empirical data" supporting the court of appeals' conclusion that placing jurisdiction over labor exemption issues in the Commission under section 15 would be inconsistent with labor policy (Gov't Br. 20). It is true that the industry has yet to experience a pre-implementation approval regimen in its collective bargaining, but surely it is not necessary to await the occurrence of self-evident consequences to conclude that collective bargaining is incompatible with the section 15 process. Not once was the Commission able to act promptly in the three instances in which collective bargaining agreements were before it. These delays are intolerable in a collective bargaining context.

Even apart from the necessity of time consuming resolution of labor exemption questions before proceeding to questions of approvability threshold, delays are unavoidable in obtaining section 15 approval even if the agreement is clearly subject to the Act and is unopposed.<sup>31</sup> If protests

<sup>31.</sup> The Commission requires that agreements first be reduced to writing and executed by all parties or by persons who can demonstrate authority to sign on the parties' behalf—no small task with industry-wide bargaining on a coast covering three western states. An original and 15 copies must be transmitted to the Commission's Washington headquarters with a formal request for section 15 approval accompanied by a memorandum and affidavits demonstrating either the consistency of the agreement with the Act, together with its transportation need, or the absence of Commission jurisdiction. (46 C.F.R. Part 522 and current practice codified in proposed amendments to these rules, 41 Fed. Reg. 51622-23 (Nov. 23, 1976).) Virtually all collective bargaining contracts have expiration dates. The Commission's rules require applications to modify or extend

are received they must be evaluated and the issues or factual contentions at least preliminarily resolved before a decision can be made respecting interim approval. Further, a protest to an urgently needed agreement puts a protestant in a position to extract substantial concessions as the price of a withdrawal of opposition, hardly a process in which collective bargaining issues will be rationally resolved.

As Boston I demonstrates, it cannot be assumed that the section 15 problem can be confined to only a few collective bargaining agreements. Realistically, any new Commission assertion of jurisdiction over collective bargaining provisions makes arguable cases of many more agreements presenting potentially analogous problems. Since the penalties for guessing wrong as to section 15 consequences can be massive, section 15 uncertainty of any kind tends to defeat resolution of labor disputes.<sup>33</sup>

already approved agreements to be filed no less than 60 days before the expiration date (46 C.F.R. Part 521). It would be a rare collective bargaining agreement that could meet this requirement. Commission staff must process the agreement, prepare a summary thereof for the Federal Register, and publish notice inviting public comment or protests. Even if no protests or objections are received, if the staff is able to act expeditiously in preparing its recommendations, if the matter can be placed on the Commission's usually weekly docket and if the Commission has a quorum on that occasion, at best no interim or other approval could be expected in less than 60 days. Delays of many months are commonplace in obtaining approval of entirely unopposed section 15 agreements.

- 32. See Marine Space Enclosures, Inc. v. Federal Maritime Comm'n, 420 F.2d 577 (D.C. Cir. 1969). The Government believes that jurisdictional "rulings will alleviate the time problems posed by collective bargaining" (Gov't Br. 29). It is unclear, however, how labor exemption issues can be resolved on the basis of a request for a ruling or, if so, why these would go any faster than the normal section 15 process. Normally, the Commission gives Federal Register notice of requests for rulings, permits wide comment thereon and then lapses into silence for months before any ruling issues.
- 33. The pre-approval implementation penalties of section 15 themselves have a significantly adverse effect on collective bargaining. Section 15 penalties up to \$1,000 per day flow for failing to file agreements even apart from whether the agreements are ultimately approvable.

For practical reasons of profound significance for collective bargaining, it makes sense to draw the line between collective bargaining and other types of maritime agreements as this Court did in *Volkswagen* and the court of appeals did here. Since persons allegedly injured would have the same antitrust remedies available as in the case of all other industries, it is difficult to see what real objections exist to this course.

### E. An Antitrust Forum Is More Consistent with National Labor Policy.

Although collective bargaining provisions may involve such severe restraints on marketplace competition as to forfeit the labor exemption, the restraints may still not constitute substantive violations of the antitrust laws.<sup>34</sup> Moreover, the plaintiff in a court case has the burden of convincing the trier of fact of the elements of the offense and of the extent of his injuries. By contrast, under section 15, upon a finding that the labor exemption is forfeited, the collective bargaining provisions are brought permanently into a context where the provisions cannot be carried out or further amended without prior Commission approval in a proceeding in which the burden of demonstrating approvability falls on the proponents.

Unlike an antitrust court, the Commission would have power under section 15 to compel the modification of labor agreements filed with it so that deals at the bargaining table may be changed by an administrative agency which lacks any understanding of labor relations (see 46 C.F.R. § 522.7). Even a party to the labor agreement could ask the agency to reject or modify provisions it had reluctantly conceded at the bargaining table.

<sup>34.</sup> Gov't Br. 40; in Connell, despite the Court's conclusion that severe anticompetitive restraints existed, the matter was remanded for trial on the merits of the antitrust claims.

Approval of labor agreements by the Commission is only the beginning of section 15 problems. PMA and ILWU jointly employ a labor arbitrator. Unlike an antitrust court, the Commission has responsibility for interpreting and resolving disputes under section 15 agreements, and if the Commission assumes jurisdiction, the arbitrator's role in adjusting disputes and in interpreting collective bargaining provisions will be displaced or reduced to an advisory opinion for the Commission to dispose of when and as it pleases.

Collective bargaining agreements are often left vague to paper over areas where overly fine definitions might make resolution of a dispute difficult or impossible. By contrast, the Commission requires section 15 agreements to be specific and unambiguous and to set forth in sufficient detail how they are to work so that any person reading the agreement can understand how it will be applied.<sup>35</sup>

Section 15 requires that in the case of informal "understandings" between the parties, a memorandum thereof be filed for approval as a section 15 agreement. It is, of course, unlawful to modify an approved section 15 agreement without further approval. Yet collective bargaining agreements are constantly the subject of grievance procedures which interpret them and to various informal understandings, historical practices and differing local interpretations. Section 15 approval of a collective bargaining agreement does not end the parties' problems; it creates an entirely new scheme of governmental supervision and second-guessing at odds with national labor policy.

- II. The Court Correctly Concluded that the Nonmember Provisions Did Not Forfeit a Labor Exemption from Section 15.
  - A. Resolution of Labor Exemption Issues Is Not Committed to the Commission's Discretion.

Despite the NLRB's expertise on issues lying at the heart of the labor exemption cases, this Court has rejected NLRB primary jurisdiction and with it any contention that the balancing of statutory policies is a matter within an agency's discretion, reversible only for abuse of discretion. Labor and antitrust cases are the regular business of courts and are not cases raising

"issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion." [Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. at 685 (Opinion of Mr. Justice White); accord, Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra, 421 U.S. at 626-35.]

The Government asserts, however, that, as a consequence of its position that jurisdiction to determine labor exemptions lies in the Commission, "the role of the reviewing court necessarily is limited" to determining whether "the Commission abused its discretion" (Gov't Br. 41), that "the court [of appeals] impermissibly trenched on an area Congress assigned primarily to the Commission" (Gov't Br. 26 [emphasis supplied]), and therefore the court erred in "itself undertaking to balance the competing interests" (Gov't Br. 41).

If severely circumscribed judicial review is the consequence of vesting jurisdiction in the Commission, it argues powerfully for withholding such jurisdiction from the Commission in the first place. The Government's position comes dangerously close to urging that Commission determinations of labor exemption issues are virtually unreviewable. This Court has never limited its review of labor exemption

<sup>35.</sup> Joint Agreement—Far East Conference and Pacific Westbound Conference, 8 F.M.C. 553, 558 (1965), aff'd sub nom. Pacific Westbound Conference v. Federal Maritime Comm'n, 440 F.2d 1303 (5th Cir.), cert. denied, 404 U.S. 881 (1971).

issues to whether the trier of fact abused its discretion, and they are the last issues that should be so treated. Deference to agency discretion or expertise assumes agency jurisdiction and expertise in the first place. If labor exemption determinations are made by an agency without special competence and having no statutory mandate to enforce the labor laws or the antitrust laws or to resolve collisions between them, the need for full and careful judicial review of the result is all the greater. (See Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 270 (1960).)

### The Court's Ruling Was Compelled by the Commission's Own Findings.

The court of appeals' ruling that, balancing labor and Shipping Act interests, the nonmember provisions were exempt from section 15 was based on the Commission's own summary of the nonmembers' contentions that the motive for the provisions was "to bring nonmembers into the PMA camp" (A.P. 62a) and to put PMA in a position of "controlling labor policies of nonmembers" (A.P. 65a). The court necessarily concluded that such contentions were in essence a claim of an unfair labor practice under the NLRA and "at worst" presented "Pennington considerations" for an antitrust court (A.P. 36a-37a).

Other than the Commission's recitation of its ultimate conclusion that on balance the provisions presented primarily Shipping Act questions, the only Commission "finding" necessarily rejected by the court was that the non-member provisions were factually similar to those in Volkswagen (A.P. 54a), a general finding so far not defended by the Government here and plainly erroneous. (See Argument, section I-B, supra.)

Overruling an ultimate conclusion of law and policy is not a failure to apply a substantial evidence test or a failure to give deference to the agency's judgment on matters within its expertise. Allegations of imposition of an improper employer bargaining unit do not raise Shipping Act questions or impinge on Shipping Act policies. In the absence of *Volkswagen*-type effects on regulated rates, there is not even a significant Shipping Act nexus, although, as the collective bargaining history shows, the nonmember provisions do represent strong labor considerations (A.P. 38a).

- III. The Collective Bargaining Provisions Did Not Forfeit the Labor Exemption Under This Court's Decisions.
  - A. No Findings or Evidence that the Terms Had Substantial Antitrust Effects on the Business Market.

Since the development of the labor exemption, no case before this Court until now has presented a challenge to a labor agreement's exemption from the antitrust laws in the absence of terms which, if imposed on other employers, would themselves constitute a

"direct restraint on the business market [which] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." [Connell, supra, 421 U.S. at 625; see Apex Hosiery Co. v. Leader, 310 U.S. 469, 512-13 (1940).]<sup>36</sup>

Although a threshold finding that the terms under attack constituted serious antitrust violations is an essential prerequisite to a forfeiture of a labor exemption, neither the Commission's four "criteria" nor its decision here adverted

<sup>36.</sup> See Federation of Musicians v. Carroll, 391 U.S. 99 (1968) (price fixing); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (ruinous costs); Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) (restrictions on marketing hours); Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797 (1945) (price fixing, monopoly, division of markets); Teamsters Local 24 v. Oliver, supra; National Woodwork Mfgs. Ass'n v. NLRB, 388 U.S. 612 (1967); St. Antoine, Connell: Antitrust Law at the Expense of Labor Law, 62 U. Va. L. Rev. 603, 606 (1976).

to any need for such an analysis (see A.P. 58a). Except for a general recitation in its conclusion (A.P. 72a-73a), the Commission made no determination that the terms themselves, if accepted by the nonmember ports, had substantial or even any effects on competition. Instead, the Commission's findings were based on effects on nonmember ports if they did not accept the terms and thereby gave up the right to employ the ILWU-PMA jointly registered work force and to participate in the ILWU-PMA fringe plans (A.P. 70a-71a, see App. 51-61). Logically, these findings relate only to whether the nonmember terms were, as a practical matter, imposed, not to any assessment of the competitive consequences of the terms themselves or consequences to nonmembers accepting them.

In the case of a shared labor force or other joint industry resource, the more valuable that resource is as compared to other alternatives, the more any terms or conditions attached to its use will, as a practical matter, be terms which those using the resource will probably decide they have to accept. However, none of the labor exemption cases suggests that the exemption is forfeited simply because employers outside the employers' unit believe they have no choice but to accept terms which do not themselves create anticompetitive effects in the marketplace. If the Commission is correct that the test for forfeiture of a labor exemption is whether terms are imposed, because bleak consequences are anticipated for an employer electing to do without the shared labor force, then any collectively bargained condition placed on use of the work force, no matter how innocuous or equal in impact, would forfeit the labor exemption. Yet there must be some terms for nonmember participation in the ILWU-PMA plans and work force, and if they do not create significant competitive restraints on the marketplace, there is no reason why they should forfeit the exemption.

In United States v. Terminal R.R. Ass'n, 224 U.S. 383, 409-11 (1912) and related cases,<sup>87</sup> the relief ordered by the Court to correct an antitrust violation arising from exclusion of a competitor from a non-labor industry joint resource provided for admission of outsiders

"upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies." [224 U.S. at 411 (emphasis supplied).]

Terminal Railroad required that, as here, all expenses and charges be equally borne by all who wished to use the terminal facilities. Accordingly, even assuming, as the Commission did, that there was no reasonably achievable alternative to nonmember use of the ILWU-PMA jointly registered work force, there is no substantive antitrust requirement that PMA and ILWU allow others to participate in access to this resource on more advantageous terms than members.

If accepted by the nonmember ports, it is clear that the present terms would place PMA members and nonmembers using the registered work force on a more equal plane of burdens and benefits as to labor costs and as to work force access (App. 291-93, 207, 210, see A.P. 55a-56a). There

<sup>37.</sup> Silver v. New York Stock Exch., 373 U.S. 341 (1963); Associated Press v. United States, 326 U.S. 1 (1945).

<sup>38.</sup> Collective bargaining, especially on a multi-employer basis, inherently involves equalization of costs and other competitive "edges" based on labor terms. The creation of a labor exemption in Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-04 (1940) and in United States v. Hutcheson, 312 U.S. 219, 230-31 (1941) correctly assumed that collective bargaining would inevitably reduce or eliminate competitive advantages of employers based on labor costs, whether the terms be wages, hours of work, or, as here, access to labor on terms more favorable than other employers. (See Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra, 421 U.S. at 622 and Harlan J., concurring in Volkswagen, 390 U.S. at 284 (1968).)

are no findings assessing anticompetitive effects in the marketplace, if any, which would flow from greater equality of labor costs and labor access. Although, during strike or lockout, all employers would lose access to the registered work force, there were no findings assessing the effect on competition, if any, with PMA members. Even assuming severe anticompetitive effects, however, provisions tending to create employer solidarity during strike or lockout are intrinsically labor policy matters, not antitrust violations. (See NLRB v. Truck Drivers' Local 449, 353 U.S. 87, 96 (1957); Clune v. Publishers' Ass'n, 214 F. Supp. 520 (S.D.N.Y.), aff'd per curiam, 314 F.2d 343 (2d Cir. 1963).)

In view of the absence of findings of significant effects of the nonmember terms on competition in the marketplace, in the event the terms were accepted by nonmembers, the Government's Brief attempts to create the equivalent of such findings, principally by describing what it candidly admits are contentions (Gov't Br. 12) that advantageous provisions in "local" contracts between ILWU and nonmember ports would be abrogated. Three examples of such contentions are cited by the Government as showing "resultant higher costs to port users" flowing from the nonmember terms (Gov't Br. 12). Each contention, however, was made by the nonmember ports in an affidavit submitted prior to the elimination of the Note to clause 3 of the 1972 agreement which the ports had contended caused all local agreements to be abrogated (App. 46-61; compare App. 261-62 "Note" with App. 291, clauses 2 and 3; see App. 204). 30 The 1973 provisions state only that a nonmember's:

"separate ILWU contract must conform with the provisions hereof, and the provisions of the PCLCA governing the selection of men for inclusion in the joint work force." [App. 291, clause 2. (emphasis supplied).]

The clause does not admit of the Government's contention that a nonmember's "local" contract with ILWU is abrogated if it is inconsistent with any PCLCA provisions. Nothing in the nonmember provisions is inconsistent with continuance of the local contract provisions to which the Government refers.

### PMA's Mandatory Duty to Bargain with ILWU on Nonmember Participation.

Even collective bargaining provisions involving price fixing, market restrictions or other serious antitrust violations may fall within the labor exemption if the terms have a "substantial effect" on subjects of labor concern such as hours of work or wages (Federation of Musicians v. Carroll, 391 U.S. 99, 112 (1968)), or, the terms are:

"so intimately related to wages, hours and working conditions [i.e., mandatory subjects of bargaining] that the union's successful attempt to obtain that pro-

<sup>39.</sup> Elimination of the Note to clause 3 necessarily removed from contention all the items referred to as examples of competitive effects of the Agreement described in footnote 16 of the Government's Brief. The nonmember ports' affidavit filed after this amendment did not controvert PMA's testimony that elimination of the Note had eliminated the "abrogation of local contracts" issue (compare App. 204 with App. 219-21) and the ports' supplemented pleading (App. 189-93) did not address elimination of that Note or its effect. The Commission's decision failed to address the effect of elimination of

the Note to clause 3 of the 1972 provisions on these examples, which had been supplied by the nonmembers to show instances of abrogation of local contract provisions before the Note was eliminated. Instead the Commission stated generally that the revised agreement was substantially the same as the 1972 agreement and proceeded to read the 1973 version as if the Note to clause 3 were still there (A.P. 47a-48a). PMA's appeal attacked this reading of the agreement. Although the court of appeals noted that PMA "has strongly contested" this finding (A.P. 5a, n.5, 36a, n.34), the court did not resolve this question because it was unnecessary to the court's disposition of the case. In any event, the verified statement of PMA's president that the nonmember provisions did not abrogate such local contract advantages (App. 204; see App. 91) and a similar statement by ILWU (App. 123) would preclude any later contention by them that the nonmember provisions were inconsistent with continuation of any local contract terms other than those inconsistent with terms of the nonmember agreement itself or the PCLCA's provisions for admission to registration.

vision through bona fide, arm's-length bargaining [is] in pursuit of their own labor union policies, and not at the behest of or in combination with non-labor groups ..." [Local 189, Meat Cutters v. Jewel Tea Co., supra, 381 U.S. at 689-90 (Opinion of Mr. Justice White).]

PMA had a mandatory duty to bargain with ILWU on ILWU's demand that nonmembers be permitted to participate as of right in the industry-wide fringe programs (App. 88). The Government's concession that PMA could not implement its Board's resolution to terminate nonmember participation "because it would require union concurrence" (Gov't Br. 9) and the history of bargaining on the subject<sup>40</sup> (App. 93, 98, 101, 122-23) compels this conclusion. The union, in insisting that the ILWU-PMA fringe plans be opened to nonmembers as a matter of right, was advancing a proper economic interest of the dockworkers it represented, who themselves were employees of PMA members. As the bargaining history set forth in the Counter Statement of the Case shows, participation makes it possible for nonmembers to provide identical benefits to registered dockworkers through the identical industry mechanisms, regardless of where these men work. Collection of employer contributions is then policed by the existing ILWU-PMA plan administrative machinery and through PMA payroll and related statistical institutions. Payment of these benefits is guaranteed by the industry as a whole and is not jeopardized by individual business failures common among small businesses such as stevedoring concerns. Moreover, participation through PMA's mechanisms

generally reduces overhead and administration costs for an employer, making it easier to pay the benefits (App. 93, 103). The Commission erred in assuming that ILWU had no interest in the terms, a conclusion that the court found "highly questionable" (A.P. 3a, n.1).

Even apart from fringe benefit issues, the terms were of direct concern to ILWU. Joint control of dockworker registration and control through the joint dispatch halls over assignment to particular nonmember jobs, as provided in clause 3, is critical to ILWU. After the long history of ILWU efforts to reduce steady men, the Commission's assertion that ILWU had "no interest" in clause 5's provisions putting member and nonmember employers of registered steady men on an equal basis is not credible. (See Waterfront Employers Ass'n, supra, 26 War. Lab. Bd. Rep. at 537-38, 565.)

Although PMA had a duty to bargain on the ILWU opening demand, PMA was under no obligation simply to grant the demand, and was entitled to bargain as to PMA's version of equal access terms on which such participation would be permitted. Contrary to the Commission's assumption (A.P. 55a), terms are not less mandatory because urged by management.<sup>41</sup>

The Commission assumed that the nonmember provisions did not concern mandatory bargaining subjects because the provisions were not addressed to the labor relations of PMA "vis-a-vis [its] own employees" and because the provisions would have an effect on labor relations between ILWU and nonmember ports using the registered work force (A.P. 59a-62a). Yet registered dockworkers are employees of PMA members, although at times they are also employees of nonmember participants who accept the non-

<sup>40.</sup> Hinson v. NLRB, 428 F.2d 133 (8th Cir. 1970); NLRB v. Houston Chapter, Assoc. Gen. Contractors of America, Inc., 349 F.2d 449 (5th Cir. 1965), cert. denied, 382 U.S. 1026 (1966); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949); see Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964).

<sup>41.</sup> Dolly Madison Industries Inc. & Teamsters Local 592, 182 N.L.R.B. 1037 (1970); United Electrical Workers v. NLRB, 409 F.2d 150 (D.C. Cir. 1969); American National Insurance Co. v. NLRB, 187 F.2d 307 (5th Cir. 1951), aff'd 343 U.S. 395 (1952).

member terms, and the ability of these employees to get credit under the ILWU-PMA plans when working for nonmembers was of the essence of the provisions in question. Even assuming, as the Commission did, that the nonmember provisions solely affected relationships between nonmembers and non-PMA employers, this was not a proper ground on which to revoke a labor exemption for terms dealing with subjects on which either party could compel the other to bargain. In Jewel Tea this Court upheld a labor exemption as to terms restricting marketing hours, which had been negotiated with one set of employers and actually imposed on another by the union. The Jewel Tea agreement between the union and the employer group contained an unusually stringent "most favored nation" clause which the district court had found precluded the union from entering into any more favorable contract governing relations between Jewel and its employees.42 Notwithstanding the significant adverse impact of the Jewel Tea terms on competition in the marketplace and the union's actual imposition of the terms, the labor exemption was preserved because the terms were sufficiently related to proper labor objectives. In the instant case the terms have no adverse competitive effect on the marketplace and are themselves mandatory bargaining subjects.

### C. The Commission Erred in Denying a Labor Exemption Without an Agreement by Which the Union Undertook to Impose Impermissible Terms.

In Pennington the Court stressed that it must be "clearly shown" that the union "has agreed with one set of employers to impose" impermissible terms on another set. (United Mine Workers v. Pennington, 381 U.S. 657, 665 (1965).) The present case is like Jewel Tea in that, as Mr. Justice White's opinion stressed, the case comes to the Court without findings or proof of the necessary labor-management conspiracy by which the union undertakes to impose the terms. (Local 189, Meat Cutters v. Jewel Tea Co., supra, 381 U.S. at 682-83; Ramsey v. United Mine Workers, 401 U.S. 302, 313 (1971); Allen Bradley Co. v. Electrical Workers Local 3, supra, 325 U.S. at 799-800).

The Commission dispensed with the Pennington/Jewel Tea/Allen Bradley requirement of a conspiracy or other agreement by which the union would impose the terms (A.P. 69a), believing such an agreement to be unnecessary in view of its finding that nonmembers had little practical alternative to using the ILWU-PMA registered work force and its finding that ILWU would probably resist work force alternatives (A.P. 70a-71a). The essence of the conspiracy requirement, however, is that while unions are free to impose labor-related conditions on employers which may severely impinge on an employer's ability to compete, they should not do so as a cat's paw of the employer's competitors and by pre-arrangement with them. The antitrust laws do not exist to protect employers from a unilateral union position taken in what the union conceives to be its

<sup>42.</sup> Jewel Tea Co. v. Local 189 Meat Cutters, 215 F. Supp. 839, 842 (N.D. Ill. 1963); see 381 U.S. at 683. Most favored nation clauses in collective bargaining contracts are themselves mandatory bargaining terms, if demanded by an employer. (Dolly Madison Industries Inc. & Teamsters Local 592, 182 N.L.R.B. 1037 (1970); see St. Antoine, Connell: Antitrust Law at the Expense of Labor Law, supra, n.36 at 612-14).

<sup>43.</sup> The requirement of a clear showing of a conspiracy to impose non-labor terms appears to have been the analytical basis on which the Opinion distinguished a "most favored nation" clause from impermissible agreements to impose terms having anticompetitive consequences. Most favored nation clauses are designed to assure that no competitive "edge" will occur as a result of bargaining with other employers, usually those outside the employer bargaining unit. The clause typically provides that any more favorable terms given other employers will be given retroactively to the bargaining employers. Such clauses promote the settlement of industrial disputes by giving the first set of employers the assurance there will be no favoritism shown in subsequent bargaining with other employers affecting the ability to compete. (See St. Antoine, supra, n.42.)

own interests. Here there was no provision or understanding precluding ILWU and the nonmember ports from bargaining any alternative work force arrangements or terms or conditions of employment that they may wish, including terms sufficiently attractive to cause registered dockworkers to switch from the PMA work force to a nonmember work force. So long as ILWU has not agreed with PMA to refuse to so bargain, ILWU is acting within the labor exemption no matter how obstinately it might choose to resist such alternatives as inconsistent with ILWU's view of its members' interests.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

LILLICK McHose & Charles

By R. Frederic Fisher
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### APPENDIX A

### NATIONAL LONGSHOREMEN'S BOARD: ARBITRATORS' AWARD

In the Matter of the Arbitration Between Pacific Coast District Local 38 of the International Longshoremen's Association, Acting on Behalf of the Various Locals Whose Members Perform Longshore Labor and Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers' Union of San Francisco and Marine Service Bureau of Los Angeles.

This award is made pursuant to agreement dated the 7th day of August, 1934, between the above named parties, which agreement is hereby referred to and made a part hereof.

Said agreement provides that the decision of the arbitrators (which shall be in writing and must be by a majority) shall constitute a series of agreements between the International Longshoremen's Association, acting on behalf of various locals whose members perform longshore labor, first party, on the one hand, and Waterfront Employers of Seattle, a list of the members of which is attached to said agreement, marked Exhibit "A", second party, Waterfront Employers of Portland, a list of the members of which is attached to said agreement, marked Exhibit "B", third party, Waterfront Employers' Union of San Francisco, a list of the members of which is attached to said agreement, marked Exhibit "C", fourth party, and Marine Service Bureau of Los Angeles, a list of the members of which is attached to said agreement, marked Exhibit "D", fifth party, separately, on the other hand, which shall be binding upon each of said parties as aforesaid for the period to and including September 30, 1935, and which shall be considered as renewed from year to year thereafter between the respective parties unless either party to the respective agreements shall give written notice to the other of its desire to modify or terminate the same, said notice to be given at least forty (40) days prior to the expiration date. If such notice shall be given by any party

<sup>1.</sup> Text set forth in Keller, supra pp. 122-27.

Appendix

(3)

other than the International Longshoremen's Association, first party, then the International Longshoremen's Association shall have fifteen (15) days thereafter within which it may give written notice of termination of all of said agreements whereon on the succeeding September 30th, all of said agreements shall terminate. If such notice or notices are not so given the agreement shall be deemed to be renewed for the succeeding year.

The arbitrators decide and award as follows:

Section 1. Longshore work is all handling of cargo in its transfer from vessel to first place of rest including sorting and piling of cargo on the dock, and the direct transfer of cargo from vessel to railroad car or barge and vice versa.

The following occupations are included in longshore work: Longshoremen, gang bosses, hatch tenders, winch drivers, donkey drivers, boom men, burton men, sackturners, side runners, front men, jitney drivers, and any other person doing longshore work as defined in this section.

Section 2. Six hours shall constitute a day's work. Thirty hours shall constitute a week's work, averaged over a period of four weeks. The first six hours worked between the hours of 8 AM and 5 PM shall be designated as straight time. All work in excess of six hours between the hours of 8 AM and 5 PM, and all work during meal time and between 5 PM and 8 AM on week days and from 5 PM on Saturday to 8 AM on Monday, and all work on legal holidays, shall be designated as overtime. Meal time shall be any one hour between 11 AM and 1 PM. When men are required to work more than five consecutive hours without an opportunity to eat, they shall be paid time and one-half of the straight or overtime rate, as the case may be, for all the time worked in excess of five hours without a meal hour. Section 3.

(a) The basic rate of pay for longshore work shall not be less than \$0.95 (ninety-five cents) per hour for straight time, nor less than \$1.40 (one dollar and forty cents) per hour for overtime, provided, however, that for work which is now paid higher than the present basic rates, the differ-

entials above the present basic rates shall be added to the basic rates established in this paragraph (a).

(b) For those classifications of penalty cargo for which differentials are now paid above the present basic rates, the same differentials above the basic rates established by this award shall be maintained and paid;

(c) For shoveling, shoveling bones in bulk, both non-offensive and offensive, ten cents above the basic rate shall

be paid in Los Angeles;

(d) For handling creosote and creosote wood products, green hides, and fertilizer, for which a differential of ten cents above the present basic rates is now allowed in Los Angeles to foremen, the same differential of ten cents shall also be paid in Los Angeles to men handling these commodities:

(e) For handling logs, piles and lumber which have been submerged, when loaded from water, ten cents above the basic rates established by this award shall be paid for

thirty tons or over in Portland;

(f) The increases in the rates of pay established by this

award shall be paid as of July 31, 1934.

Section 4. The hiring of all longshoremen shall be through halls maintained and operated jointly by the International Longshoremen's Association, Pacific Coast District, and the respective employers' associations. The hiring and dispatching of all longshoremen shall be done through one central hiring hall in each of the ports of Seattle, Portland, San Francisco and Los Angeles, with such branch halls as the Labor Relations Committee, provided for in Section 9, shall decide. All expense of the hiring halls shall be borne one-half by the International Longshoremen's Association and one-half by the employers. Each longshoreman registered at any hiring hall who is not a member of the International Longshoremen's Association shall pay to the Labor Relations Committee toward the support of the hall a sum equal to the pro rata share of the expense of the support of the hall paid by each member of the International Longshoremen's Association.

Section 5. The personnel for each hiring hall shall be determined and appointed by the Labor Relations Committee for the port, except that the dispatcher shall be selected by the International Longshoremen's Association.

Section 6. All longshoremen shall be dispatched without favoritism or discrimination, regardless of union or non-

union membership.

Section 7. The Labor Relations Committee on Seattle, Portland and Los Angeles, where hiring halls now exist, shall decide within twenty days from the date of this award whether a hiring hall now in use shall be utilized. If in any of said ports no decision is made within such twenty days, a new hall shall be established in such port within thirty days from the date of this award.

Section 8. The hiring and dispatching of longshoremen in all the ports covered by this award other than those mentioned in Section 4, and excepting Tacoma, shall be done as provided for the ports mentioned in Section 4; unless the Labor Relations Committee in any of such ports establishes other methods of hiring or dispatching.

Section 9. The parties shall immediately establish for each port affected by this award, a Labor Relations Committee to be composed of three representatives designated by the employers' association of that port and three representatives designated by the International Longshoremen's Association. By mutual consent the Labor Relations Committee in each port may change the number of representatives from the International Longshoremen's Association and the employers' association. In the event that such committee fails to agree on any matter, they may refer such matter for decision to any person or persons mutually acceptable to them, or they shall refer such matter, on request of either party, for decision to an arbitrator, who shall be designated by the Secretary of Labor of the United States or by any person authorized by the Secretary to designate such arbitrator. Such arbitrator shall be paid by the International Longshoremen's Association and by the employers' association in each port. Nothing in this section shall be construed to prevent the Labor Relations Committee from agreeing upon other means of deciding matters upon which there has been disagreement.

Section 10. The duties of the Labor Relations Committee shall be:

(a) To maintain and operate the hiring hall;

(b) Within thirty days from the date of this award to prepare a list of the regular longshoremen of the port, and after such thirty days no longshoreman not on such list shall be dispatched from the hiring hall or employed by any employer while there is any man on the registered list qualified, ready and willing to do the work. No one shall be registered as a longshoreman who did not, during a period of three years immediately preceding May 9, 1934, derive his livelihood from the industry during not less than any twelve months. Pending the preparation of these lists, no longshoreman who was a member of a gang or who was on any registered list or extra list between January 1, 1934, and May 9, 1934, shall be denied the opportunity of employment in the industry. The Labor Relations Committee, in registering longshoremen, may depart from this particular rule;

(c) To decide questions regarding rotation of gangs and extra men; revision of existing lists of extra men and of casuals; and the addition of new men to the industry when

needed;

(d) To investigate and adjudicate all grievances and

disputes relating to working conditions;

(e) To decide all grievances relating to discharges. The hearing and investigation of grievances relating to discharges shall be given preference over all other business before the committee. In case of discharge without sufficient cause, the committee may order payment for lost time or reinstatement with or without payment for lost time;

(f) To decide any other question of mutual concern relating to the industry and not covered by this award.

The committee shall meet at any time within twenty-four hours, upon a written notice from either party stating the purpose of the meeting.

Appendix

(7)

Section 11.

(a) The Labor Relations Committee for each port shall determine the organization of gangs and methods of dispatching. Subject to this provision and to the limitations of hours fixed in this award, the employers shall have the right to have dispatched to them, when available, the gangs in their opinion best qualified to do their work. Subject to the foregoing provisions gangs and men not assigned to gangs shall be so dispatched as to equalize their earnings as nearly as practicable, having regard to their qualifications for the work they are required to do. The employers shall be free to select their men within those eligible under the policies jointly determined, and the men likewise shall be free to select their jobs;

(b) The employees must perform all work as ordered by the employer. Any grievance resulting from the manner in which the work is ordered to be performed shall be dealt

with as provided in Section 10;

(c) The employer shall have the right to discharge any man for incompetence, insubordination or failure to perform the work as required. If any man feels that he has been unjustly discharged, his grievance shall be dealt with as provided in Section 10:

(d) The employer shall be free, without interference or restraint from the International Longshoremen's Association, to introduce labor saving devices and to institute such methods of discharging and loading cargo as he considers best suited to the conduct of his business, provided such methods of discharging and loading are not inimical to the safety or health of the employees.

(Signed) Edward J. Hanna, Chairman (Signed) Edward F. McGrady

I concur except as to the provisions of Section 3.
(Signed)

O. K. Cushing

Dated this 12th day of October, 1934 At San Francisco, California.

### CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief for Respondent Pacific Maritime Association upon all parties by causing three (3) copies thereof to be mailed, postage pre-paid and properly addressed, to counsel of record for each party.

Executed this 20th day of September, 1977 at San Francisco, California.

R. FREDERIC FISHER

FILED

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MICHAEL RODAK IR., CLERK

## In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL MARITIME COMMISSION and United States of America, petitioners

PACIFIC MARITIME ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL MARITIME COMMISSION AND THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

ν.

PACIFIC MARITIME ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

# COMMISSION AND THE UNITED STATES

Three points must be kept in mind in placing the issues in this case in proper perspective.

- 1. There are two discrete legal questions, which respondents' arguments sometimes fuse: (a) whether the Federal Maritime Commission has any jurisdiction under Section 15 of the Shipping Act, 1916, over collective bargaining agreements; (b) whether, if it has jurisdiction, it properly exercised it over the provisions of the collective bargaining agreement involved in this case by declining to apply to those provisions a labor exemption.
- 2. The factual context in which these legal issues arise is as follows: the Pacific Maritime Association and the Union entered into a collective bargaining agreement that

requires employers who are not members of the Association, in order to use the joint registered work force, to observe the same terms and conditions, as set forth in the Nonmember Participation Agreement, that Association members must follow. On the basis of its analysis of the contract and the effect of that agreement upon nonmembers of the Association, the Commission concluded that "the Agreement is specifically designed to compel nonmember entities to join PMA under threat of exclusion from the ILWU work force," and "it clearly imposes terms and conditions upon persons outside the bargaining group" (Pet. App. 62a-63a; see also, id., 55a-56a, 66a, 67a-69a, 70a-71a).

3. The Commission has not decided anything with respect to approval or disapproval of the agreement under Section 15 or other sections of the Act. It will decide those questions only after a hearing and further proceedings. It has decided only the threshold questions with respect to exercising its jurisdiction to examine the agreement under the standards of those sections.

1

Respondents' argument that Section 15 does not cover any provisions of any collective bargaining agreement, no matter how sérious its anticompetitive effect or how adverse its impact upon Shipping Act interests may be, does not focus upon either the broad language of that section or the basic design of the Shipping Act. See our opening brief, pp. 22-27. Instead, respondents argue primarily (PMA Br. 28-34, 41-42; ILWU Br. 32, 37-47) that either the National Labor Relations Board or an antitrust court is a better qualified forum to make the judgments and evaluations necessary and appropriate to define the permissible scope of provisions in collective bargaining agreements that pose significant anticompetitive consequences for the shipping industry.

A. The Union contends (ILWU Br. 24-30, 48; see also PMA Br. 27-28) that in Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, the Court held that Section 15 does not apply to collective bargaining agreements. It refers to the Court's statements (id. at 278) that the only agreement "involved" in the case was that among the members of the Association, that it was "not concerned here " " with the collective bargaining agreement between the Association and the ILWU," that there was no claim that the latter agreement "was subject to the filing requirements of §15," and that nothing it said "is to be understood as questioning [its] continu[ed] validity."

These statements cannot bear the weight the Union ascribes to them. The Court was merely making clear that in holding that Section 15 covered the agreement among PMA members, which implemented the collective bargaining agreement, it was not deciding anything with respect to the applicability of that section to the collective bargaining agreement itself. The present case squarely presents that issue. Volkswagenwerk did not decide the question. As our opening brief explained (pp. 23-27), however, the rationale of that decision is inconsistent with the view that Section 15 may never cover any provision of a collective bargaining agreement, no matter how serious its anticompetitive effect may be.

B. The fact that some aspects of the Nonmember Participation Agreement may raise issues under the National Labor Relations Act that may be subject to the jurisdiction of the National Labor Relations Board does not make Section 15 inapplicable to the entire agreement. The Commission has jurisdiction to determine those issues under the agreement that are cognizable under the Shipping Act. See our opening brief, pp. 52-53. When two

statutes apply to the same subject, "the rule is to give effect to both if possible" (United States v. Borden Co., 308 U.S. 188, 198-199). The labor aspects of anticompetitive provisions of collective bargaining agreements in the shipping industry are to be recognized and dealt with under the labor exemption of Section 15, and not by ousting the Commission of any jurisdiction over those provisions in favor of the National Labor Relations Board or an antitrust court.

C. Respondent PMA contends (Br. 37, n. 31, 40) that the Commission's requirement that all agreements filed with it pursuant to Section 15 must be written and specific is inconsistent with collective bargaining procedures, which leave many understandings "vague to paper over areas where overly fine definitions might make resolution of a dispute difficult." The Act itself, however, permits the filing of memoranda describing the contents of oral agreements (Section 15, A.P. 80a).

PMA also alleges (Br. 37, n. 31) that the procedures for obtaining Commission approval of an extension of an

agreement are cumbersome.<sup>2</sup> The Commission, however, will extend an old agreement while the new agreement is being negotiated, and recently has done so. See Order of Approval, November 2, 1977. No. T-3007-3 (New York Shipping/Association International Longshoremen's Association).<sup>3</sup>

Respondents apparently do not question that, if Section 15 covers collective bargaining agreements, the Commission properly recognizes a labor exemption therefrom that is derived from and comparable to the labor exemption this Court has recognized under the antitrust laws. They argue, however, that the Commission erroneously denied a labor exemption to the Nonmember Participation Agreement.

A. Both respondents contend (PMA Br. 4-14, 47-49; ILWU Br. 16-21, 35-36, 42-46) that the Nonmember

PMA cites (Br. 25-26) a 1941 report of a House Committee dealing with the extension of the existence of a marine labor board that Congress had created in the Merchant Marine Act of 1936, 49 Stat. 1985, as amended. The Committee stated that the Board was the "only Government agency with which copies of all labor agreements are required to be filed" (H.R. Rep. No. 354, 77th Cong., 1st Sess. 2 (1941)). Of course, the views of a 1941 Congress provide little guidance concerning the intent of the Congress that enacted the Shipping Act in 1916. Moreover, this statement does not show, as PMA contends (Br. 25), that "Congress demonstrated its assumption that Section 15 was not applicable to maritime collective bargaining agreements." As we have explained (see our opening brief, pp. 37-40), not all maritime collective bargaining agreements are required to be filed with the Commission under Section 15, but only those that involve persons subject to the Shipping Act, that affect competition or otherwise meet the criteria of Section 15, and that are not subject to a labor exemption.

<sup>&</sup>lt;sup>2</sup>PMA refers (Br. 36-37) to the Commission's alleged delay in granting interim and final approvals. The Commission, however, has moved quickly when the parties requested such action. See Agreement No. T-3007, New York Shipping Ass'n/ILA Assessment Agreement (November 1, 1974) (agreement filed September 30, 1974, interim approval granted November 1, 1974); New York Shipping Association Cooperative Working Arrangement, FMC Docket No. 69-57 (filed February 26, 1970, interim approval granted March 11, 1970).

PMA also claims (Br. 40) that the Commission would replace the labor arbitrator and labor grievance procedures. Agreements that Section 15 covers, however, regularly contain self-policing provisions, including procedures for handling grievances (See 46 C.F.R. 522.6).

<sup>&</sup>lt;sup>3</sup>The union contends (ILWU Br. 38) that, unlike PMA, it would not benefit from the antitrust exemption that Commission approval of an agreement under Section 15 would provide, because it is not subject to the Act. The immunity that Section 15 provides for agreements the Commission has approved, however, is for the agreement itself, not just for the parties to it (A.P. 82a).

Participation Agreement is entitled to a labor exemption because the Union has an interest in the integrity and work opportunities of the registered work force and in the fringe benefits the Agreement covers. There is no question that the Union has such an interest. The Union unilaterally could demand from nonmembers of PMA whose employees it represents the same terms it undertook to require under the agreement.

The question is whether the Union properly may implement that interest through an agreement with PMA under which the latter and the Union jointly undertake to control the terms and conditions of employment for employees of nonmembers of PMA who are in a different bargaining unit. Such a combination is not exempt from the laws regulating competition. Connell Construction. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622-623; United Mine Workers of America v. Pennington, 381 U.S. 657, 665-666; Burlington Truck Lines v. United States, 371 U.S. 156, 173.

The Nonmember Participation Agreement is competitively advantageous to PMA. It avoids the possibility that nonmembers would be able to undercut PMA members' charges because of lower labor and fringe benefit costs and their ability to continue to operate if the Union struck PMA members. The president of PMA stated: "This creates an obvious competitive disadvantage to PMA members" (App. 90; see also App. 102, where a vice president of PMA explained that "the PMA members are at a competitive disadvantage where nonmembers enjoying the benefits of the contract can get favored treatment in regard to the utilization of the workforce, the employment of steady men, the privilege of working when members cannot, and even going so far as to take advantage of that latter situation and handle cargo which would otherwise be handled by members during strike or stoppage periods.") As the Commission pointed out (A.P. 55a-56a), "PMA itself readily admits that the purpose of the supplemental agreement is to \* \* \* place nonmembers on the same 'competitive' basis as members of the PMA."

The Union states that it agreed to certain terms concerning the employment of its men by nonmembers of PMA "reflect[ing] some of PMA's interest" as a quid pro quo for "PMA benefits [being] made available to all employees no matter for whom they worked" and that this reciprocity entitled the entire agreement to a labor exemption (ILWU Br. 20-21, 35-36). In view of the existing institutions on the West Coast for the employment of longshoremen, some agreement on the access of nonmembers to joint PMA/ILWU and PMA-operated programs and facilities is necessary. Further, members of a multi-employer bargaining unit may insist that they receive any more favorable terms that the Union negotiates with their competitors. Dolly Madison Industries, Inc., 182 NLRB 1037, 1038.

It does not follow, however, that an employer group such as PMA may join with the Union in imposing employment terms and conditions upon employers and employees outside the group. Whatever may be the permissible limits of unilateral union action leveling wage competition, a union-employer combination reaching outside the bargaining unit to regulate employment terms of third parties is not exempt from the antitrust laws. United Mine Workers of America v. Pennington, supra, 381 U.S. at 665-666.

B. Respondents argue that the Commission's finding that the Revised Agreement "has \* \* \* a potentially severe and adverse effect upon competition" (A.P. 70a) was inadequate because the Commission failed to make a "finding that the terms under attack constituted serious antitrust violations" (PMA Br. 18, 22-23, 43-41; ILWU Br. 31-32). They also complain that the Commission failed to find that any higher costs to nonmembers

resulting from the Revised Agreement would alter "rates or charges subject to Shipping Act regulation or creat[e] discriminatory rates" (PMA Br. 22). These contentions rest on two fallacies: that only an impact on rates would affect Shipping Act interests; and that a violation of the antitrust laws or the Shipping Act must be found before an exemption can be denied.

- 1. The Shipping Act covers a wide range of competitive relationships in the maritime industry. Section 15 broadly requires filing of any agreement "controlling, regulating, preventing, or destroying competition." The statutory criteria for approval relate not only to antitrust considerations, as incorporated in the "public interest" standard (see Pet. Br. 33), but to any form of unjust discrimination or unfairness, detriment to the commerce of the United States, other injury to the public interest, or violation of other provisions of the Act. Shipping Act values are deeply implicated in this case, particularly by the ports' allegations that the agreement is an attempt to control competition by nonmembers in a manner contrary to the public interest, and that the agreement may result in unjust discrimination among rival ports.
- 2. Denial of a labor exemption from Section 15 does not require a finding that an agreement violates the Shipping Act or the antitrust laws. In Connell Construction Co., supra, this Court found the agreement involved was not exempt, and then remanded the case for a determination whether it violated the Sherman Act. 421 U.S. at 637. Indeed, the reason for a preliminary determination whether there is an exemption is to avoid what may turn out to be lengthy and unnecessary litigation of the substantive issues. It was to avoid just such litigation that the Commission here severed for separate determination the exemption question from the issues under the Shipping Act (App. 21-24). The issues of violation of the Shipping Act and the antitrust laws need be reached only if there is no labor exemption.

Contrary to respondents contention (PMA Br. 44; ILWU Br. 31), the Commission properly concluded that the Revised Agreement would have serious anticompetitive effects. The Commission not only discussed the adverse effects that would result if a nonmember refused to sign the agreement, but also analyzed the adverse effects upon Shipping Act interests if the nonmember signed the agreement. The Commission found that nonmembers who signed the Revised Agreement would incur higher costs (A.P. 67a-68a), because that agreement would require nonmembers to participate in PMA fringe benefit programs, to observe PMA labor policies if the Union caused a work stoppage, to use steady men in the same manner as PMA members, and generally to "share in the \* \* \* joint work force upon the same terms as apply to members of PMA" (A.P. 63a-65a). It also noted that PMA "readily admits that the purpose of the supplemental agreement is to do away with the 'free ride' previously enjoyed [by nonmembers] \* \* \* and to place nonmembers on the same 'competitive' basis as members of PMA" (A.P. 55a-56a).

### CONCLUSION

For the foregoing reasons and for those in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. McCree, Jr., Solicitor General.

JOSEPH N. INGOLIA,
General Counsel,
Federal Maritime Commission.

DECEMBER 1977.

## Supreme Court of the United States

October Torse, 1976

No. 76-990

PEDERAL MARITIME COMMUNION AND UNITED STATES OF AMERICA.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMENTS AND WAREHOUSEVERTS UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, AND PORTS OF ANACOSTES, BELLINGHAM, SVERETT, GRAYS HARBOR, CLYMPIA, FORT ANGELES, PORTLAND AND TACOMA.

ON WEST OF CHRISTIANS TO THE UNITED STATES.
COURT OF APPRACE FOR THE DISTRICT OF COLUMNIA C.

MUTTOR OF WOLFSHORCER INSPORT-GESELLSCHAFF MARL FOR LEAVE TO FEE A SRIEF ANICUS CURIAS AND BRIEF

> Harrier Russe Chores H. Guetz Alan A. D'Aresio Hinrarello & Busine, P.C.
> Anterrope for Wolfsburg
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## Supreme Court of the Anited States

October Term, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v

Pacific Maritime Association, International Longshoremen's and Warehousemen's Union, Council of North Atlantic Shipping Associations, and Ports of Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, Portland and Tacoma,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF WOLFSBURGER TRANSPORT-GESELLSCHAFT m.b.H. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Wolfsburger Transport-Gesellschaft m.b.H. ("Wobtrans"), pursuant to Rule 42 of this Court, respectfully requests leave to file a brief amicus curiae in this proceeding in general support of the petitioners, the Federal Maritime Commission and the United States of America.

Wobtrans is a corporation organized and existing under the laws of the Federal Republic of Germany and is a wholly-owned subsidiary of Volkswagenwerk Aktiengesellschaft, the manufacturer of Volkswagen vehicles.

Wobtrans has taken over from its parent company the responsibility for transporting Volkswagen vehicles to this country. (For convenience, Wobtrans and its parent are at times collectively referred to herein as "Volkswagen.") Wobtrans is currently engaged in shipping vehicles to Pacific Coa. t ports where they are discharged by members of the Pacific Maritime Association ("PMA") operating under the agreement at the heart of this proceeding.

The jurisdiction of § 15 of the Shipping Act, 1916 (46 U.S.C. § 814) (the "Act") over cooperative working arrangements by multi-employer groups in the maritime industry was first established in Volkswagenwerk Aktienge-sellschaft v. Federal Maritime Comm'n, 390 U.S. 261 (1968). This was a proceeding brought by Volkswagen after an unequal and disproportionate financial burden had been imposed on automobiles by PMA. As a result of the decision in that case, the burden on automobiles was substantially reduced, although not eliminated.

Wobtrans has since participated in numerous proceedings before the Federal Maritime Commission (the "Commission" or "FMC") and the federal courts of appeals regarding similar arrangements. These cases have involved the PMA, among other organizations, and have raised both the issue of the jurisdiction of the Commission and the propriety of the assessment agreements entered into by these organizations. Currently pending before the Court of Appeals for the District of Columbia Circuit is one of these matters in which Wobtrans has challenged a PMA assessment formula. Wolfsburger Transport-Gesellschaft m.b.H.

v. Federal Maritime Commission, United States of America and Pacific Maritime Association (No. 74-1934).

Wobtrans has a real and vital interest in filing a brief amicus curiae in opposition to the decision below. That decision would in effect restore to multi-employer groups the arbitrary and unregulated power they exercised prior to Volkswagenwerk. It would exempt their cooperative working arrangements from the supervision of the Commission, provided only that such arrangements were incorporated into an agreement to which a union was a signatory. With the cooperation of a maritime union, these groups would be free once again to place disproportionate burdens on Volkswagen and other cargoes and carriers not represented within the councils of these groups, or forming a minority of their membership.

As a shipper of cargo to the pacific coast ports and other ports of the United States, Volkswagen belongs to the class of persons the Commission was created to protect. To the extent that agreements in the maritime industry are removed from surveillance by the Commission, and taken outside §§ 16 and 17 of the Shipping Act, the protection given Volkswagen by the Shipping Act against discriminatory treatment is reduced.

Accordingly, Wobtrans seeks leave to file this brief as amicus curiae to urge this Court to reject a construction of the Shipping Act which would substantially erode the jurisdiction established in Volkswagenwerk and emasculate the Shipping Act. It is hopeful that the considerations it will place before this Court will assist it in resolving the issues presented by the grant of a writ of certiorari.

Wobtrans has been advised that petitioners and the respondent ports have no objection to its filing a brief amicus curiae: However, respondent PMA and other respondents in this proceeding have not consented. Wherefore, it is respectfully requested that Wobtrans be granted leave to file a brief amicus curiae.

Dated: New York, New York May 31, 1977

Respectfully submitted,

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IN THE

## Supreme Court of the United States

October Term, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOBE-MEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, AND PORTS OF ANA-CORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

### BRIEF AMICUS CURIAE OF WOLFSBURGER TRANSPORT-GESELLSCHAFT m.b.H.

### Introduction and Statement of Interest of Amicus Curiae

The decision of the Court of Appeals in this proceeding creates a loophole in the statutory framework which the Shipping Act, 1916, erected for the protection of shippers. The court below, finding a conflict between labor and shipping objectives, would exempt "collective bargaining agreements as a class from section 15." (App. A. 35a).

Alternatively, the Court of Appeals, believing the agreement here involved to be distinguishable from that in Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261 (1968) ("Volkswagenwerk"), would exclude the Commission from jurisdiction under § 15 because of what it deems the unsuitability of the preapproval system of the Shipping Act to labor agreements (App. A. 35a-38a).

As a shipper, Wobtrans is seriously threatened by the construction placed on the Shipping Act by the court below. In Volkswagenwerk, this Court established that a multiemployer group, in implementing obligations assumed under a labor agreement, was subject to the controls which the Shipping Act placed on the exercise of collective power in the maritime industry. As a direct consequence of that decision, Wobtrans' parent, Volkswagenwerk Aktiengesellschaft, secured an immediate reduction in the heavy and disproportionate burden laid on its cargo by PMA. Since then, other multi-employer associations on every coast have had to recognize that when charges are levied on cargo or carriers, they must be "reasonably related to the service rendered." Volkswagenwerk, supra, 390 U.S. at 282. Automobiles have not been the only beneficiary of the Commission's supervisory jurisdiction: bananas, newsprint, container cargo, bulk cargo and the Puerto Rican carriers have all secured reductions in the burdens they otherwise would have borne.

If the decision below stands, shippers will be put back to where they were before *Volkswagenwerk*. Any employer group will be able to avoid the Commission's supervisory jurisdiction under §15 simply by having the union with which it negotiates become a signatory to its cooperative working arrangement. Whether or not such agreement qualifies for a "labor exemption" under the antitrust laws, the Commission will be ousted from its parallel jurisdiction. The temptation to multi-employer groups to restore the excessive burdens placed on outsiders or minority interests, like Wobtrans, will be irresistible.

Accordingly, Wobtrans seeks leave to file this brief as amicus curiae in order to persuade this Court not to permit this destructive construction to be placed on the Shipping Act, 1916.

### **Summary of Argument**

Although purporting to respect the legislative intent underlying the Shipping Act equally with the statutory scheme relevant to labor and antitrust, the court below focuses solely on the interests of labor in reaching its conclusion that any collective bargaining agreement is automatically exempt from § 15 of the Shipping Act. Given no consideration whatsoever is the deleterious effect of that construction on the shippers, carriers, and other persons which the Shipping Act was designed to protect from the arbitrary exercise of collective power.

This Court, in Volkswagenwerk, overruling arguments similar to those accepted below, confirmed the jurisdiction of the Commission over labor-related agreements which raised "shipping" problems. Exercise of that jurisdiction by the Commission in the intervening nine years has not increased labor strife, and has proved immensely beneficial not only to automobiles, but to other carriers and cargoes, including container cargo, newsprint, bananas and the carriers in the Puerto Rican trade. The hidden benefits may be even greater because multi-employer groups are aware that all cooperative arrangements must pass the scrutiny of the Commission.

<sup>&</sup>lt;sup>1</sup> The references to appendices are to those attached to the petition for *certiorari* filed by the Solicitor General.

The addition of a union as a signatory to an agreement that otherwise would fall under § 15 is, in all respects, a "distinction without a difference." The effect on collective bargaining is the same, whether an agreement implementing the terms of a collective bargaining agreement follows, or is included in, the original negotiations. Equally, so far as the wards of the Shipping Act are concerned, the potential for discrimination is unaltered, so that the simplistic rule adopted below, making § 15 jurisdiction depend on the presence or absence of a union's signature, would leave them without protection against arbitrary collective action.

The collective bargaining agreements here involved raise "shipping," as distinct from labor, problems. In compelling non-PMA members to pay PMA assessments for PMA's costs, they are indistinguishable from the agreement involved in Volkswagenwerk. Since they could not claim a labor exemption from the antitrust laws, they should be regulated by the Commission under the Shipping Act, rather than the courts under the antitrust laws. The legislative intent was to give the Commission jurisdiction, in the first instance at least, over anticompetitive agreements in the maritime industry.

### ARGUMENT

I.

The statutory scheme embodied in the Shipping Act is ignored and misunderstood by the court below.

As the court below correctly stated, its task was to "draw the line between shipping, labor and antitrust concerns in such a way that each statutory scheme remains effective." (App. A. 27a). But when the court came to draw such a line, it wholly ignored the statutory scheme embodied in the Shipping Act. Although the construction it placed on the Shipping Act would substantially frustrate the legislative purpose behind its enactment, there is wholly lacking from the critical section of its opinion (App. A. 26a-41a) any analysis of that purpose, or any consideration of the effect upon the legislative scheme of the conclusions reached by the court. Not even lip service is paid to any of the various canons of statutory construction in resolving so basic a question as the jurisdictional reach of broad regulatory legislation such as the Shipping Act.

The lower court's sole focus was on how best to facilitate collective bargaining.<sup>2</sup> In its view, the type of regulation provided by the Shipping Act (in particular, the necessity for securing prior approval from the Commission before a § 15 agreement can be put into effect) poses grave obstacles to the rapid resolution of labor disputes (App. A. 28a). The court also dislikes the penalties imposed under §§ 15, 16 and 17 of the Act (App. A. 31a). Accordingly, it would exempt "collective bargaining agreements as a class from section 15." (App. A. 35a).

The breach such a construction opens in the regulatory powers of the Commission, and the implications for the

<sup>&</sup>lt;sup>2</sup> Characteristic of the court's reasoning are the following observations culled from its opinion: Including negotiated labor agreements under § 15 "would place collective bargaining units in the shipping industry under more stringent federal regulation than other transportation industries and thus at a competitive disadvantage." (App. A. 28a). The FMC ruling "would make nearly impossible the maintenance or prompt restoration of industrial peace." *Ibid.* "[T]he delicate balance struck by the competing interests of labor and management" might be "upset by partial invalidation of the collective bargaining terms." (App. A. 30a). "Agreements between labor and management \* \* cannot be fitted into the pre-implementation approval procedures of section 15 without ignoring the national policy fostering industrial peace through collective bargaining." (App. A. 42a).

wards of the Shipping Act, are left entirely unexamined. Such references to the Shipping Act as appear in the court's opinion, reflect a pervasive misunderstanding of the Act's salutary purposes, and of the important role of the Commission in carrying them out.

The court's fundamental misconception of the Commission is shown in its description of the Commission as an "agency whose primary concern is to foster trade competition" (App. A. 29a). Exactly the contrary is true. The Commission was created because Congress recognized that trade competition was not feasible in the maritime industry. Its role is to supervise the anticompetitive arrangements the statute deliberately permits. In the maritime industry, competitors are allowed to "moderate the rigors of competition," but the regulatory function of the Commission "insures that their immunity from the antitrust laws will be subject to careful control." Federal Maritime Comm'n v. Akiebolaget Svenska Amerika Linien, 390 U.S. 238, 241-43 (1968).

The court below also fell into error when it described the Shipping Act as having been passed because of "abuses in both domestic and foreign shipping caused by secret anticompetitive agreements between shippers." (App. A. 11a) (emphasis supplied; footnote omitted). The shippers were not the instigators but the victims of abuses of anticompetitive agreements by third persons, and it was for their protection primarily that the Shipping Act was passed and the Commission created.

A very careful and comprehensive investigation by Congress of conditions in the maritime industry preceded the enactment of the Shipping Act. As summarized by a later Congress, that Act "rests on the assumption that the prosperity of our foreign commerce and the maintenance of a strong and independent merchant marine can best be secured through strict administrative surveillance of shipping conferences, agreements, and operations, insistence upon fair play and equal treatment for shippers large and small, protection of cargo and ports against unfair discrimination, and prevention of practices designed to eliminate or hamper independent carriers." H.R. Rep. No. 1419, 87th Cong., 2d Sess., 381 (1962).

Any interpretation placed on the Shipping Act should give effect to the legislative intent and carry out the purposes of the Act to the extent possible. Because the court below misconceived that intent and those purposes, it necessarily failed to do so. Wholly lacking from its opinion is any consideration of the effect of putting outside the regulatory power of the Commission all collective action to which a union makes itself a party. Equally absent is any concern with the consequences to the Congressional objectives of "fair play and equal treatment for shippers large and small [and] protection of cargo and ports against unfair discrimination." H.R. Rep. No.

<sup>&</sup>lt;sup>3</sup> Instructive in this connection is the following excerpt from the Alexander Report (House Committee on the Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade), H.R. Doc. No. 805, 63d Cong., 2d Sess., 308 (1914), the genesis of the Shipping Act. Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 490 (1958);

Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, supra, 390 U.S. at 275 (1968); Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726, 736 (1973):

<sup>&</sup>quot;[M]any of the communications received from shippers \* \* \* state that their experience has been to the effect that, once the combination of lines is established, it is apt to be used in an arbitrary and unfair way by favoring some large corporation or friend to the detriment of other shippers. Such discriminations and arbitrary treatment, it is believed, can only be eliminated by the establishment of some legally constituted authority which is empowered to hear complaints and to order the discontinuance of abuses." See, also, Alexander Report, supra at 418.

1419, 87th Cong., 2d Sess., 381 (1962). Otherwise, the court below could not have concluded that it had drawn the line "in such a way that each statutory scheme remains effective." (App. A. 27a).

### II.

The Commission's exercise of its § 15 jurisdiction pursuant to the *Volkswagenwerk* case has benefited the maritime industry and has not prejudiced labor.

Before examining the implications to the Commission's jurisdiction and regulatory powers of the decision below, it is appropriate to examine the results of *Volkswagenwerk*, in which this Court insisted, in the face of arguments very similar to those relied on by the court below, that the Commission assume jurisdiction over the manner in which a multi-employer association allocated costs arising from a collective bargaining agreement.

The principal ground on which PMA contested such jurisdiction, both before the Commission and the courts,4

was that "the exclusive jurisdiction given the National Labor Relations Board over collective bargaining" precluded jurisdiction in the Commission. Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 371 F.2d 747, 752 (D.C. Cir. 1966), rev'd, 390 U.S. 261 (1968).

As amicus curiae, the International Longshoremen's and Warehousemen's Union ("ILWU") contended that it was "unrealistic to suggest that the financing of the Mech Fund is no part of the collective bargaining relationship between the parties."

Mr. Justice Douglas of this Court shared the concerns of the ILWU, and dissented from this Court's holding that PMA's agreement was under § 15. He feared, he said, that this Court's construction of § 15 "will cause serious disruption in the process of collective bargaining in the maritime industry." Volkswagenwerk, supra, 390 U.S. at 295-96. He was apprehensive that "legitimate and speedy collective bargaining in the maritime industry" would be frustrated in consequence of the "undue and possibly lengthy freezing or stultification of solutions to trouble-some labor problems while an intimate part of the proposed agreement is sent to the FMC for approval." Volkswagenwerk, supra, 390 U.S. at 312-13.

<sup>4</sup> In language strongly reminiscent of that employed below, PMA argued to this Court that the penalties imposed by the Shipping Act made its application to collective bargaining totally unacceptable: "Furthermore, a construction of Section 15 that suggests that the negotiation, administration and implementation of labor agreements are within Section 15 would necessitate numerous filings with the Commission. A Section 15 agreement cannot be implemented until it is approved. The potential penalty of one thousand dollars a day per person involved in an unapproved Section 15 agreement assures that maritime firms will proceed cautiously if there is any risk of Section 15 coverage. Thus, virtually every labor agreement, irrespective of whether it is ultimately held to be within the Section, would be filed and would risk fatal delay at the whim of a single objector." Brief for Pacific Maritime Association, Intervenor at 30, Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n. 390 U.S. 261 (1968).

The Commission, while not agreeing that it was precluded in all circumstances, stated that it would follow the interpretation the courts had given the Interstate Commerce Act: "A showing has been required, before labor-management agreements have been held to be subject to the jurisdiction of the ICC, that they have some impact upon the competitive relationship of those entering into them." Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corp., 9 F.M.C. 77, 83 (1965), aff'd sub nom., Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 371 F.2d 747 (1966), rev'd, 390 U.S. 261 (1968). Not finding such impact, the Commission held itself to be without jurisdiction under § 15.

<sup>&</sup>lt;sup>6</sup> Brief on Behalf of International Longshoremen's and Warehousemen's Union as Amicus Curiae in Support of Judgment Below at 83, Volkswagenwerk, supra.

The years which have elapsed since the decision in Volkswagenwerk have not confirmed these fears, but have conclusively demonstrated the value of this Court's construction of the Act. The necessity for securing the Commission's approval of assessments levied by the many multi-employer groups operating in the United States has proved immensely beneficial to many types of cargo and many carriers.

To the best of the knowledge of Volkswagen (which is active in many ports of the United States), during the entire period since the decision in Volkswagenwerk, no labor dispute has ever been either precipitated or prolonged because of the supervisory jurisdiction exercised by the Commission over the allocation of costs resulting from collective bargaining. Furthermore, the Commission has demonstrated an enormous flexibility in its procedures to ensure that its supervisory jurisdiction not interfere with the necessary collection of monies to meet collective bargaining obligations (App. A. 29a-30a).

At the same time, the carriers and the cargoes subject to the assessments levied by these powerful employer organizations have secured very substantial relief from disproportionate financial burdens which they otherwise would have been powerless to combat. Not only did automobiles secure some reduction in PMA's assessment after the decision in Volkswagenwerk, but so did bulk cargo and con-

tainers.\* Furthermore, these reductions have proved permanent and have been retained in funding the many collective bargaining agreements that have succeeded the one giving rise to Volkswagenwerk.

When the East Coast equivalent of PMA, the New York Shipping Association ("NYSA"), adopted a variant of PMA's tonnage tax, the Commission forced NYSA to modify the burden imposed on the exclusively containerized Puerto Rican movement, and the specialized carriers handling newsprint and automobiles.

Not all the benefits to shippers and carriers from the Commission's § 15 jurisdiction over labor-related agreements are necessarily reflected in these litigated proceedings. The problems first encountered by PMA on the West Coast have since been duplicated in almost every port in the United States. Increasingly, a major burden in every port is the cost of compensating labor for lost work opportunities due to containerization and other forms of mechanization. Throughout the country, therefore, employer associations have had to reach agreement respecting how these new costs are to be met. They have done so in full

The reduction PMA made in the burden placed on automobiles substantially reduced that burden, but fell far short of curing the original inequity: the burden on automobiles was left twice as great as that on breakbulk. Furthermore, the reductions made for bulk and container cargoes also aggravated the original injustice to automobiles. While Volkswagen did not initially oppose approval by the Commission of the revised PMA formula, it is now seeking to eliminate the discrimination which remains. The Commission's decision adverse to Volkswagen is now on appeal to the Court of Appeals for the District of Columbia Circuit. Wolfsburger Transport-

Gesellschaft m.b.H. v. Federal Maritime Comm'n, Docket No. 74-1934 (D.C. Cir.), appeal pending. But while Volkswagen is challenging how the Commission has discharged its responsibilities under the Shipping Act, that in no way detracts from the value to Volkswagen, and other shippers and carriers, of the existence of that jurisdiction in the Commission.

<sup>\*</sup> Agreements No. T-2148 and T-2149, Pacific Maritime Association Assessment Agreements, F.M.C. Docket No. 68-18 (1969).

<sup>\*</sup> Agreement No. T-2336—New York Shipping Association, 15 F.M.C. 259 (1972). aff'd sub nom., Transamerican Trailer Transport, Inc. v. Federal Maritime Comm'n, 492 F.2d 617 (D.C. Cir. 1974); see, also, New York Shipping Ass'n, Man-Hour/Tonnage Assessment Formula, F.M.C. Docket No. 73-34 (1973).

<sup>10</sup> E.g., Hewaiian Work Stabilization and Utilization Program ("WSUP"), Notice of Agreement Filed, 34 Fed. Reg. 6,268 (1969); New Orleans Steamship Ass'n, Notice of Agreement Filed, 37 Fed. Reg. 9,054 (1972); West Gulf Maritime Ass'n, Notice of Agreement Filed, 37 Fed. Reg. 18,582 (1972).

awareness that any agreement into which they enter must be filed with the Commission and will have to be justified if any type of cargo or any class of carrier complains that it has been unfairly burdened. But for the Commission's 5 15 jurisdiction, it is safe to guess that disproportionate burdens would have been the norm. This is because, to the extent one type of cargo or carrier pays more, another type pays less. Inevitably, therefore, the cargoes or carriers dominating any particular employer group would have been tempted, absent an ombudsman, like the Commission, to shift the burden of these new costs to outsiders or minority members. But arbitrary exercise of power by these organizations has been held in check by the knowledge that whatever they did would have to pass the scrutiny of the Commission.

Precisely as Congress intended when it enacted the Shipping Act, powerful organizations exercising collective power have been prevented from engaging in discriminatory and arbitrary conduct because of the existence of the Commission, a "legally-constituted authority which is empowered to hear complaints and to order the discontinuance of abuses." Alexander Report (House Committee on the Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade), H.R. Doc. No. 805, 63d Cong., 2d Sess., 308 (1914).

### III.

That a union signs an agreement otherwise subject to § 15 should not oust the Commission from jurisdiction.

The court below would take outside the jurisdiction of the Commission any agreement to which a union is a signatory. It justifies this interpretation as required by the conflicting policy considerations, and as necessary to leave effective the statutory schemes relevant to shippers, labor and antitrust (App. A. 26a-27a).

But, in fact, there is no difference in the impact on shipping or labor of jurisdiction in the Commission over labor-related agreements and labor-management negotiated agreements. Volkswagenwerk supra, 390 U.S. at 309-11 (Douglas, J., dissenting). If the policy considerations stressed by the court below were decisive, this Court would not have reversed the Court of Appeals in Volkswagenwerk.

The court below is not unaware of this fact. As the court guardedly acknowledges, were the choice its to make, it would undo the *Volkswagenwerk* decision for the very reasons it now seeks to limit that decision on technical grounds:

"While we might prefer a rule that more adequately protects labor negotiations from the very real, if more distant, interference permitted in Volks-wagenwerk, we see no valid purpose in extending that rule to encourage immediate disruption of negotiations." (App. A. 35a).

But, if one starts from the apposite premise, that a rule that adequately protects the wards of the Shipping Act is to be preferred, then no valid purpose is served in limiting it because one piece of paper, rather than two, is involved. Mr. Justice Harlan, in his concurring opinion in Volkswagenwerk, made exactly this point:

"The fact that the 'labor agreement' and the 'assessment' agreement were on different pieces of paper is of course not critical. What is important is that the whole process raised both labor problems and distinct shipping problems. It would not be impossible for there to be a single agreement raising

some problems of Labor Board 'concern' and other, separate problems appropriate to Commission review." Volkswagenwerk, supra, 390 U.S. at 291 n.7.

Accordingly, the Second Circuit was clearly correct when it termed "a distinction without a difference" the fact that NYSA's assessment agreement, unlike PMA's in Volkswagenwerk, was part of a collective bargaining agreement. New York Shipping Ass'n v. Federal Maritime Comm'n, 495 F.2d 1215, 1220 (2d Cir. 1974), cert. denied, 419 U.S. 964 (1974). It held that the jurisdiction established by Volkswagenwerk was unaffected by the fact that the agreement there was "solely among stevedoring contractors, terminal operators and carriers, while the ILA took an active part in negotiating and is a party to the agreement here at issue." In sharp contrast with the opinion below, the Second Circuit noted that:

"[T]he Commission was correct in concluding that its regulation of the assessment formula would have a minimal impact on the collective bargaining process, while exempting the agreement from Shipping Act regulation would expose certain classes of shippers and carriers to potentially massive, inequitable cost increases". New York Shipping Ass'n v. Federal Maritime Comm'n, supra, 495 F.2d at 1221-22." (emphasis supplied).

The concern which the Second Circuit expressed for the impact on certain classes of shippers and carriers of excluding NYSA's agreement from the Shipping Act finds no echo in the opinion of the court below. Furthermore, despite the preoccupation of the court below with collective bargaining, it nowhere explains why, so far as labor is concerned, the addition of the ILWU's signature is not "a distinction without a difference." Indeed, the court appears indirectly to concede that it cannot, and that what it is doing is elevating form above substance:

"An argument can be made, undoubtedly, that a separation is arbitrary which permits the FMC to oversee employer agreements intended to fulfill a collective bargaining obligation but denies this approval procedure for the bargaining agreement itself." (App. A. 35a).

Concern for the rights of labor must be balanced by concern for the shippers, carriers and other maritime interests intended to be protected by the Shipping Act. A union should not have the right, simply by making itself a party, to oust the Commission from jurisdiction and to strip maritime concerns of their statutory protection against abuses of collective power.

The conclusions reached by the Second Circiut, not those arrived at below, are more clearly consistent with Volks-wagenwerk and with the obligations lying on the courts to give full effect to all relevant statutes:

"To be sure, the FMC has no concern with so much of the agreement as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters. But even though we fully accept that the ILA has an important stake in the existence of a workable and reliable

In unsuccessfully urging this Court to grant certiorari from the decision of the Second Circuit, the ILA made virtually the same argument adopted by the court below in this case. It claimed that the Second Circuit's decision placed "a complex and unnecessary burden on collective bargaining in an industry long known for its volatile labor relations," since an assessment formula agreed upon by the ILA and NYSA would lack "certainty until it is approved by FMC." ILA's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 9, New York Shipping Ass'n v. Federal Maritime Comm'n, 495 F.2d 1215 (2d Cir. 1974), cert. denied, 419 U.S. 964 (1974).

of its duty to determine whether the formula is reasonable in its effects on shipping. That inquiry is just as important as under the predecessor agreement and under the agreement in Volkswagenwerk. Similarly, the fact that the union has here succeeded in forcing NYSA to bargain over the assessment formula does not by itself take the formula out of the reach of § 15. The union's achievement demonstrates its power to force this concession, but it does not dilute the magnitude of problems raised by the formula for shippers and carriers." New York Shipping Ass'n v. Federal Maritime Comm'n, supra, 495 F.2d at 1220-21.

### IV.

Section 15 jurisdiction should be held to exist wherever an agreement raises shipping problems.

### A. The court below misapprehends the facts relevant to the "balancing test."

This brief so far has discussed the arbitrary division the court below would create between agreements within and without § 15 jurisdiction based on whether or not a union was a signatory (App. A. 35a). As we have pointed out, to the extent labor is concerned, whatever obstacles § 15 approval poses to collective bargaining are present whether or not the potential § 15 agreement is a laborrelated agreement or a labor-management negotiated agreement, and experience has demonstrated that they are minimal. So far as persons subject to the Shipping Act are concerned, there is likewise no substantive difference. Therefore, the court's arbitrary "line" has no support in underlying factual differences and would provide a facile way for employer groups to evade the very valuable protection shippers and carriers have enjoyed since Volkswagenwerk against arbitrary collective action.

The court below, however, supplies an alternate ground for overturning the Commission's finding of jurisdiction under § 15, saying that even if it were to apply "the balancing test suggested by Justice Harlan, the agreement at issue would be exempt from filing." (App. A. 35a).

Mr. Justice Harlan, in his concurring opinion in Volkswagenwerk, rejected the simplistic view that collective bargaining agreements were automatically exempt from § 15 and called the problem one of "line drawing." Volkswagenwerk, supra, 390 U.S. at 284. He was also critical of the opposite position that any agreement which "affects competition" came within the jurisdiction of the Commission, observing that "any significant multi-employer agreement on economic matters 'affects competition' with respect to prices and services to the public." Volkswagenwerk, supra, 390 U.S. at 287.

Acknowledging necessarily some labor exemption from the filing requirements of §§ 15, 16 and 17 of the Shipping Act, as well as from the antitrust laws, Mr. Justice Harlan found it unnecessary to delineate it precisely, because "the assessment agreement before us is not immune or exempt, for it raises 'shipping' problems logically distinct from the industry's labor problems \* \*." Volkswagenwerk, supra, 390 U.S. at 287 (emphasis in original). He found such "shipping" problems in the effect that PMA's allocation of the cost burden of mechanization had on competition among terminal companies for the trade of shippers of Volkswagen vehicles.

The court below reads Volkswagenwerk too narrowly. Mr. Justice Harlan did not find the agreement there involved to be subject to the Commission's supervision because it "produced discriminatory tariffs—a primary concern of the Act—for the shipping of automobiles" (App.

A. 35a-36a). There were no tariffs involved.<sup>12</sup> Equally, § 15 jurisdiction did not rest on the claim of discrimination. As Mr. Justice Harlan pointed out, § 15 makes no distinction between "good agreements" and "bad ones." Volkswagenwerk, supra, 390 U.S. at 285 n.3.<sup>13</sup>

Turning to the facts of the present case, the agreements here involved go beyond "wage, fringe benefit and work stoppage terms" (App. A. 36a). Among other things, these agreements would compel non-PMA members to pay the same dues and assessments to PMA on the same basis as PMA members (App. A. 5a-6a n.6). No difference suggests itself between an agreement allocating the cost of a mechanization agreement to PMA and one allocating the cost of the operations of PMA. If one is a "shipping" problem, so is the other. Equally, it is difficult to conceive what legitimate interest a union has in how PMA, an employer organization, meets its expenses.

In short, there appears to be clearly present here "shipping' problems logically distinct from the industry's labor problems." These agreements, therefore, do not "fall neatly into either the Labor Board or Maritime Commission domain; \* \* [they] raise issues of concern to both." Volkswagenwerk, supra, 390 U.S. at 286.

B. Agreements raising shipping problems and not entitled to a "labor exemption" should be subject to Commission jurisdiction.

While the court below may have taken too restrictive a view of the Commission's jurisdiction, the Commission itself may have taken too expansive a view.

The Commission appears to assume the existence of jurisdiction in itself over all collective bargaining agreements in the maritime industry unless the agreement would be covered by the "labor exemption" which statutes and court decisions have carved out of the antitrust laws (App. A. 40a). But there is no statutory basis for such an assumption. Section 15 is not an unlimited grant of jurisdiction. Cf., Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973). It embraces only the agreements described therein. This means that "shipping problems" must be present before jurisdiction attaches. If they are, then the "labor exemption" test is clearly relevant.

Certainly, where a union lends its name to what is, in effect, an employer-inspired agreement, the Commission

<sup>12</sup> The charges made to shippers of automobiles by terminal operators were the product of private negotiation, and not the subject of schedules of charges. Had tariffs been involved, the Commission would not have refused jurisdiction, as it did, because there was no evidence of "an additional agreement by the PMA membership to pass on all or a portion of its assessment to the carriers and shippers served by the terminal operators." Volkswagenwerk Aktiengesell-schaft v. Marine Terminals Corp., supra, 9 F.M.C. at 83. Charges in printed tariffs would have supplied such evidence.

<sup>&</sup>quot;We stress that the Section 15 question in this case is not whether the assessment agreement should have been approved or disapproved, but whether the agreement—good or bad—is unenforceable because it has not been filed with the Commission. We think so." Brief for the United States at 17, Volkswagenwerk, supra.

<sup>14</sup> Section 15 (46 U.S.C. § 814) reads in part:

<sup>&</sup>quot;Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements."

should have jurisdiction. Cf., Allen Bradley Co. v. Local 3, Int'l Brotherhood of Electrical Workers, 325 U.S. 797, 809-11 (1945); Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 622-23 (1975); "[B]enefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." United States v. Women's Sportswear Manufacturers Ass'n, 336 U.S. 460, 464 (1949). These principles support the Commission in requiring that, to take an agreement outside § 15, it must be the result of collective bargaining carried on in good faith, and not the product of a conspiracy with management.

The other criteria as to when a labor exemption exists are also helpful in determining the presence of shipping—as distinct from labor—interests. If the agreement in question would not qualify for an exemption under the antitrust laws, and if it "raises 'shipping' problems logically distinct from the industry's labor problems," it would be inconsistent with the statutory schemes underlying the antitrust and shipping laws for the Commission to lose its jurisdiction over such agreement to the courts.

The conclusion of the court below that the anti-trust laws should apply because this is preferable from the viewpoint of labor and the unions ignores the fact that Congress has made a deliberate determination that in the § 15 area, the maritime industry should not be controlled by the courts under the antitrust statutes, but, at least initially, should be regulated by the Commission. Federal Maritime Comm'n v. Akiebolaget Svenska Amerika Linien, supra, 390 U.S. 238, 241-43 (1968); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966); Far East Conference v. United States, 342 U.S. 570 (1952); United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932). Exclusion of

the Commission must necessarily frustrate the legislative purpose to subject to the general supervision of the Commission all conditions of water transportation which affect "shipping" interests.

From the viewpoint of the shippers, carriers and other maritime interests covered by the Shipping Act, the very circumstances that make that statute unappealing so far as labor is concerned are precisely its advantages. The necessity for securing prior approval of a § 15 agreement ensures immediate protection against arbitary impositions through the collective power of the employer associations and unions acting in concert; whereas, under the antitrust laws, review may come late, injunctions are unavailable, and damages may be too speculative to recover. Furthermore, under the antitrust laws, private parties must bear the burden of litigating the matter unless and until it is decided in their favor. For many small companies, the amount involved might fall far short of justifying the expense; and even for large companies, the potential costs might act as a very strong deterrent. By contrast, the statutory scheme embodied in the Shipping Act makes the Commission the guardian of the maritime industry and permits inequitable agreements to be challenged in administrative proceedings. in which participation should be less costly and timeconsuming than the litigation of a complex antitrust case.

Because the antitrust laws have, to a large extent, been suspended so far as the maritime industry is concerned, more protection—not less—is needed from collective action joined in by powerful labor unions. Persons in the maritime industry are parties to a multitude of cooperative working relationships. When, to the collective power they enjoy, is added the power lying at the command of the powerful maritime unions, any opponent is put at an enormous dis-

<sup>&</sup>lt;sup>15</sup> Local 189, Meat Cutters v. Jewel Tea Co., Inc., 381 U.S. 676 (1965); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

advantage. Only a Government agency is strong enough to resist such collective pressures.

Experience to date belies the claim that Commission jurisdiction will radically interfere with collective bargaining. No labor unrest has ever been traced to the pendency for many years before the Commission of the various proceedings involving assessments for the West Coast Pay Guarantee Plan and for the East Coast's Guaranteed Annual Income, nor, in this case, has the jurisdictional dispute respecting a collective bargaining agreement adopted almost four years ago apparently led to any strikes or other labor unrest.

In the Volkswagenwerk case, the court below also held that the remedy, if any, against abuse by PMA of its collective power lay in the antitrust laws:

"We are not to be taken as closing our eyes to [Volkswagenwerk AG's] claim that it is the target of a combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter. That issue is not for the Commission or the court in this proceeding. It suffices to say that agreements not approved by the Commission are not protected from attack under the antitrust laws." Volkswagenwerk, supra, 371 F.2d at 759 n.13.

This Court rejected that view of the law then; it should do so again.

### CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Dated: May, 1977.

Respectfully submitted,

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# In the Supreme Court of the

# **United States**

Остовев Тевм, 1976

No. 76-938

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

V

Pacific Maritime Association, International Longshoremen's and Warehousemen's Union, Council of North Atlantic Shipping Associations, and Ports of Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, Portland and Tacoma,

Respondents.

Response of Respondent Pacific Maritime
Association to Motion of Wolfsburger
Transport-Gesellschaft m.b.H.
for Leave to File a Brief
Amicus Curiae

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June 9, 1977

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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V.

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Respondent Pacific Maritime Association ("PMA") was among those parties who did not consent to the filing of a brief amicus curiae by Wolfsburger Transport-Gesellschaft m.b.H. ("Wobtrans"). This memorandum explains why PMA's consent was withheld and suggests that the Court should deny Wootrans' motion.

It appears from the motion that Wobtrans does not represent an interest affected by or prospectively affected by the labor agreement or the type of labor agreement at issue. The Wobtrans motion does not allege that Wobtrans is an employer of dockworkers, or that Wobtrans is a customer of employers of non-PMA dockworkers. The motion alleges that:

"Wobtrans is currently engaged in shipping vehicles to Pacific Coast ports where they are discharged by members of the Pacific Maritime Association . . . ." (Wobtrans Motion p. 2.) (Emphasis supplied)

Yet it is the interests of non-PMA employers of dockworkers which are allegedly affected by the agreement before the Court.

Wobtrans purports to speak on behalf of the interests of shippers of cargo. (Motion p. 3.) But there is no suggestion in this case that the collective bargaining agreement in question had effects or potential effects on any shipper of cargo such as Wobtrans or its parent or on the prices they pay for shipping services, whether they are customers of PMA employers or of non-PMA employers. Thus, whether or not this Court subjects the instant collective bargaining agreement to section 15 of the Shipping Act, the result will not affect Wobtrans, its corporate parent or any other shipper of cargo.

Wobtrans' concern is with a possible "spillover" effect of the rationale of the Court of Appeals' decision on labor cost assessment agreements in fact made among maritime employers only but nominally incorporated into collective bargaining contracts. (Brief, p. 7.) That issue does not exist in this case, since the Court of Appeals confined the broad rationale of its decision, exempting collective bargaining agreements from section 15 of the Shipping Act, to agreements actually bargained between labor and management. (See PMA Brief in Opposition to Petition for Certiorari, pp. 10 and 12; 543 F.2d at 396, 409.) No party here has urged that the Court of Appeals' rationale be extended to cover inter-employer agreements tacked on to a collective bargaining contract.

The Wobtrans amicus brief, consistent with Wobtrans' interest, reargues the Volkswagen case (Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261 (1968)) and similar inter-employer labor cost assessment cases, instead of addressing the type of agreement at issue here. (Wobtrans Brief pp. 6, 12-18.) Because it seems doubtful that the Court would be aided by amicus reargument of Volkswagen and other labor cost assessment cases by a participant therein, it is submitted that the motion to file the amicus brief in question should be denied.

Respectfully submitted,

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> Attorneys for Respondent Pacific Maritime Association

Of Counsel:

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June 9, 1977

#### CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Response of Respondent Pacific Maritime Association to Motion of Wolfsburger Transport-Gesellschaft m.b.H. for Leave to File a Brief Amicus Curiae upon all parties by causing three (3) copies thereof to be mailed, postage prepaid and properly addressed, to each of the counsel of record.

Executed this 9th day of June, 1977 at San Francisco, California.

R. FREDERIC FISHER